151 U 8673

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RECORD, CASE No. 13,949.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~301~~. 67

J. WILSON MARTIN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 13, 1890.

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1 UNITED STATES OF AMERICA,
District of West Virginia.

Be it remembered that the records and proceedings of the circuit court of the United States for the district of West Virginia, at Martinsburg, W. Va., among other things show the following, to wit:

At a circuit court of the United States for the district of West Virginia continued and held at Parkersburg, in said district, on the 11th day of June, 1888—present, the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia—among others the following order was made and entered of record, to wit:

J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.
Trespass on the Case.

This 11th day of June, 1888, came the Baltimore and Ohio Railroad Company, by John A. Hutchinson, its counsel, and presented here in court a copy of the record in this suit, duly certified, and moved the court to docket the same herein; and thereupon it is ordered that the said cause be, and the same is, docketed in this court and be proceeded in to final determination herein.

Copy of the Record Filed in This Suit.

2 STATE OF WEST VIRGINIA,
County of Berkeley, ss:

Be it remembered that the records and proceedings of the circuit court for Berkeley county, among other things, show the following, to wit:

In the Circuit Court of Berkeley County.

J. WILSON MARTIN, by JOHN W. MARTIN, Who is Admitted by the Court Here to Prosecute for the said J. Wilson Martin (Who is an Infant within the Age of Twenty-one Years) as the Next Friend of the said J. Wilson Martin, Plaintiff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant.

To S. H. Martin, clerk of said court:

Issue summons in the above-entitled case against the defendant in an action of trespass on the case, returnable to March rules, 1888. Damages, $10,000.00.

FLICK & WESTENHAVER, *p. q.*

March 1st, 1888.
1—301

STATE OF WEST VIRGINIA:

To the sheriff of Berkeley county, Greeting:

You are hereby commanded to summon Baltimore and Ohio Railroad Company, a corporation, if it be found in this county, to appear at the clerk's office of the circuit court of Berkeley county, at rules to be held for the said court, on the first Monday in
3 March, 1888, to answer J. Wilson Martin, by John W. Martin, who is admitted by the court here to prosecute for the said J. Wilson Martin (who is an infant within the age of twenty-one years) as the next friend of the said J. Wilson Martin, of a plea of trespass on the case for damages $10,000.00, and have then there this writ.

Witness S. H. Martin, clerk of our said court, at the court-house of said county, in the town of Martinsburg, the 3rd day of March, 1888.

S. H. MARTIN, *Clerk.*

Sheriff's Return.

Executed the within summons by delivering a true copy to John T. Martin, the regularly authorized agent of the Baltimore and Ohio Railroad Company, at the principal office of said company, in Martinsburg, Berkeley county, West Virginia, this 5th day of March, 1888, at 11 o'clock a. m., the said John T. Martin being a resident agent of said county.

ROBERT LAMON, *S. B. C.*

Declaration.

STATE OF WEST VIRGINIA, *County of Berkeley,* } *To wit:*

March Rules, 1888.

J. Wilson Martin, by John W. Martin, who is admitted by the court here to prosecute for the said J. Wilson Martin (who is an infant within the age of twenty-one years) as the next friend of the said J. Wilson Martin, complains of the Baltimore and Ohio
4 Railroad Company, a corporation, of a plea of trespass on the case, for this, to wit: That before and at the time of committing the grievances complained of hereinafter the said defendant was the proprietor of a certain railway for the carriage of passengers and was a common carrier of passengers for hire and reward to the said defendant in that behalf from Piedmont, to wit, in the State of West Virginia, to Chester, to wit, in the State of Pennsylvania; and the said defendant being such proprietor of said railway and such common carrier of passengers heretofore, to wit, on the 22nd

from Piedmont, in the State of West Virginia, to, to wit, Chester, in the State of Pennsylvania, as aforesaid, for a certain reward to the said defendant in that behalf; and the said defendant then and there received the said plaintiff as such passenger, and thereupon it became and was the duty of the said defendant to use due and proper care that the said plaintiff should be safely carried by and upon said railway upon said journey; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care that said plaintiff should be safely carried by and upon said railway on said journey as aforesaid, but wholly neglected so to do, and the said defendant, by its servants, so negligently, carelessly, and improperly managed, controlled, and ran its cars and locomotives upon said railway that the train of cars in and upon which the said plaintiff was being carried as a passenger on said journey as aforesaid, while making said journey and before the arrival thereof at, to wit, Chester, in the State of Pennsylvania, as aforesaid, was then and there, to wit, on the 22nd day of May, in the year 1887, through the negligence, carelessness, and improper conduct of said defendant by its servants, ran upon and against and struck with great force and violence by another locomotive and train of cars upon said defendant's railway, under the control, management, and direction of said defendant by its servants, and by reason thereof the left thigh of said plaintiff was fractured and broken in three places, and the right leg of said plaintiff was fractured and broken in one place, and the said plaintiff was otherwise greatly hurt, bruised, wounded, and injured, and also by reason of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so continued for a long space of time, to wit, hitherto, during all of which time the said plaintiff suffered great pain, and said plaintiff is now still sick, sore, lame, and disordered, and is now still suffering therefrom great pain, and the said plaintiff will so long as he lives continue sore, sick, lame, and disordered, and will during all said time, to wit, so long as said plaintiff shall live, suffer great pain therefrom; and by means of the premises the said plaintiff has been ever since the happening of the injuries aforesaid, is now, and so long as he shall live will continue to be, totally and permanently crippled, disabled, and injured; and the said plaintiff for a long space of time, to wit, from the happening of said injuries to the bringing of this suit, has been totally incapacitated and prevented from transacting, attending to, and performing his lawful and necessary affairs, business, and occupation, and so long as said plaintiff shall live he will, by reason of said premises, be permanently and totally incapacitated, disabled, and prevented from attending to, transacting, and performing his necessary and lawful affairs, business, and occupation, to the damage of the said plaintiff $10.000.00.

2nd count. And for this also, to wit, that before and at the time

reward to the said defendant in that behalf from, to wit, Piedmont, in the State of West Virginia, to, to wit, Chester, in the State of Pennsylvania, and the said defendant being such proprietor of said railway and such common carrier of passengers heretofore, to wit, on the 22nd day of May, 1887, the said plaintiff, at the special instance and

7 request of the said defendant became and was a passenger upon said railway, to be safely carried thereby upon a certain journey, to wit, from Piedmont, in the State of West Virginia, to wit, to Chester, in the State of Pennsylvania, as aforesaid, for a certain reward to the said defendant in that behalf; and the said defendant then and there received the said plaintiff as such passenger, and thereupon it became and was the duty of the said defendant to use due and proper care that the said plaintiff should be safely carried by and upon said railway upon said journey as aforesaid, yet the said defendant, not regarding its duty in that behalf, did not use due and proper care that the said plaintiff should be safely carried by and upon said railway on said journey, but wholly neglected so to do; and the said defendant by its servants knowingly placed and put the said plaintiff in cars or coaches, to be carried upon said journey as aforesaid, which were old, unsound, rotten, unfit, and unsafe for the purpose of carrying and transporting passengers upon said journey, all of which was fully known to the said defendant; and the said defendant by its servants so negligently, carelessly, and improperly managed, controlled, and ran its cars and locomotives upon said railway that the train of cars in and upon which the said plaintiff was being carried as a passenger on said journey as aforesaid, while making said journey and before the arrival thereof at, to wit, Chester, in the State of Pennsylvania, as aforesaid, was through the negli-

8 gence and carelessness and improper conduct of the said defendant by its servants then and there, to wit, on the 22nd day of May, 1887, run upon and against and struck with great force and violence by another locomotive and train of cars upon said defendant's railway, under the control, management, and direction of said defendant by its servants; and the said cars or coaches in which said plaintiff was placed and put, being, as aforesaid, old, unsound, rotten, unfit, and unsafe for the carriage and transportation of passengers upon said journey, were by reason of said collision crushed, splintered, and broken, and by means thereof the left thigh of said plaintiff was fractured and broken in three places and the right leg of said plaintiff was fractured and broken in one place, and the said plaintiff was otherwise greatly hurt, bruised, wounded, and injured, and also by means of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so continued for a long space of time, to wit, hitherto, during all of which time the said plaintiff suffered great pain, and said plaintiff is now still sick, sore, lame, and disordered, and is now still suffering therefrom great pain; and the said plaintiff will so long as he lives continue sore, sick, lame, and disordered, and during all said time, to wit, so long as said plaintiff shall live, will suffer great pain therefrom, and by means of the premises the said plaintiff has been

ever since the happening of the injuries and said plaintiff so long as he shall live will continue to be totally and permanently disabled, crippled, and injured; and the said plaintiff by reason thereof for a long space of time to wit from the happening of said injuries to the bringing of this suit has been totally incapacitated from transacting, attending to and performing his lawful and necessary affairs business and occupation and so long as said plaintiff shall live he will by reason of said premises be permanently and totally incapacitated disabled and prevented from attending to transacting and performing the necessary and lawful affairs business and occupation to the damage of the said plaintiff $30,000.00

2nd count. And for this also to wit that the said defendant was a carrier of passengers upon a railway from to wit Piedmont in the State of West Virginia to to wit to Chester in the State of Pennsylvania for reward to the defendant in that behalf and the said plaintiff became and was received by the defendant as a passenger to be by the said defendant safely and securely carried upon said railway upon said journey to wit from Piedmont in the State of West Virginia to to wit Chester in the State of Pennsylvania for a reward to the said defendant and thereupon it became and was the duty of said defendant to use due and proper care that the plaintiff should be safely carried to and upon said railway upon said journey aforesaid yet the said defendant did not use due and proper care that he said plaintiff should be safely and securely carried upon said journey aforesaid but wholly neglected so to do and the said defendant so carelessly negligently and improperly conducted itself in carrying said plaintiff upon said journey aforesaid and in managing the said railway and the carriage and train in which the plaintiff was a passenger upon said railway at said journey aforesaid that he said plaintiff was by reason thereof then and there to wit on 22nd day of May 1897 while upon said journey and before the arrival at to wit Chester in the State of Pennsylvania wounded injured and disabled and thereby said plaintiff has ever since the happening of said injuries suffered & now suffers and so long as he shall live will continue to suffer great pain and by reason of the premises and the said wounds and injuries received & aforesaid he said plaintiff has ever since the happening thereof been totally disabled and incapacitated from transacting and attending to his lawful and necessary affairs business and occupation and the said plaintiff has and so long as he shall live will continue to be totally and permanently incapacitated disabled and prevented from attending to transacting and performing his lawful and necessary affairs business labor and occupation to the damage of the said plaintiff $30,000.00

3rd count. And for this also to wit that the said defendant before and at the time of committing the grievances hereinafter mentioned was the proprietor of a certain line of railway running through the States of West Virginia and Pennsylvania from to wit Piedmont in the State of West Virginia to to wit Chester in the

State of Pennsylvania, and the said defendant was then and there operating the said line of railway as a common carrier of goods and passengers for a certain hire and reward to the said defendant in that behalf, and the said defendant was also then and there the proprietor and owner of a certain line of telegraph known as the Baltimore and Ohio telegraph, which was then and there used and operated by the said defendant in connection with said railway along said line as aforesaid, and the said plaintiff was then and there in the employ of said defendant as a second-grade climber in the telegraph service, and as such it was his duty and business to work at the construction and repair of said line of telegraph, and the said plaintiff was then and there, to wit, on the 21st day of May, 1887, and for a long time prior thereto, so employed in constructing and repairing the said telegraph line of said defendant as aforesaid at and near Piedmont, in the State of West Virginia, and, being so employed, said plaintiff was afterwards, to wit, on the 21st day of May, 1887, ordered and required to leave the place at which he had been working as aforesaid and go to, to wit, Chester, in the State of Pennsylvania, there to be employed in the construction and repair of said line of telegraph as aforesaid; and the said defendant being such proprietor of said line of railway and such common carrier of passengers heretofore, to wit, on the 22nd day of May, 1887,

12 the said plaintiff, at the special instance and request of the said defendant, became and was a passenger upon said railway, to be safely carried thereby on said journey, to wit, from Piedmont, in the State of West Virginia, to, to wit, Chester, in the State of Pennsylvania, for a certain reward to the said defendant in that behalf, and the said defendant then and there received the said plaintiff as such passenger, and thereupon it became and was the duty of said defendant to use due and proper care in the selection of its employees for the carriage and transportation of said plaintiff on said journey as aforesaid and to use due and proper care in providing safe and suitable cars, coaches, and appliances to be used in the carriage and transportation of said plaintiff on said journey as aforesaid and to use due and proper care that said plaintiff should be safely carried upon said railway on said journey as aforesaid, yet the said defendant, not regarding its duty in that behalf, did not use due and proper care in the selection of its said employees and in providing safe and suitable cars, coaches, and appliances, and did not use due and proper care that the said plaintiff should be safely carried upon said journey as aforesaid, but wholly neglected so to do, and the said defendant knowingly selected and employed as dispatcher of trains and yardmaster at Baltimore, Maryland, a station on the rout- of said plaintiff's journey as aforesaid, Albert Merklin, an incompetent and unfit person for such a responsible position, and the said defendant, by its servants, did knowingly use,

13 for the purpose of carrying said plaintiff upon said journey, as aforesaid, cars or coaches which were old, rotten, unsound, unfit, and unsafe for the purpose of carrying passengers upon said journey as aforesaid, all of which was fully known to said defendant, and by the use of due and proper care in the inspection thereof

could have become known to it; and the said defendant by its servants, and particularly by the said Albert Merklin, did negligently, carelessly, and improperly manage, control, and run its cars and locomotives upon said railway; that the train of cars upon which the said plaintiff was being carried as a passenger on said journey as aforesaid, while making said journey and before the arrival thereof at, to wit, Chester, in the State of Pennsylvania, as aforesaid, was through the negligence, carelessness, and improper conduct of said defendant by its servants, and more particularly the said Albert Merklin, then and there, to wit, on the 22nd day of May, 1887, ran upon and against and struck with great force and violence by another locomotive and train of cars upon said defendant's railway under the control, management, and direction of said defendant by its servants, and the said cars or coaches in and upon which said plaintiff was placed and put, being, as aforesaid, old, unsound, rotten, unfit, and unsafe for the carriage and transportation of passengers upon said journey, were, by reason of said collision, crushed, splintered, and broken, and by means thereof the left thigh of said plaintiff was fractured and broken in three places and the
14 right leg of said plaintiff was fractured and broken in one place and the said plaintiff was otherwise greatly hurt, bruised, wounded, and injured; and by means of the premises the said plaintiff became and was sore, sick, lame, and disordered, and so continued for a long space of time, to wit, hitherto, during all which time the said plaintiff suffered great pain, and said plaintiff is now still suffering therefrom great pain, and the said plaintiff will, so long as he lives, continue, by reason of said injuries, to be sore, sick, lame, and disordered, and during all said time, to wit, so long as said plaintiff shall live, will suffer therefrom great pain; and also by means of the premises the said plaintiff has been, ever since the happening of said injuries aforesaid, is now, and so long as he shall live will continue to be totally and permanently crippled, disabled, and injured; and the said plaintiff, by reason thereof, for a long space of time, to wit, from the happening of said injuries to the institution of this suit, has been totally incapacitated and prevented from transacting, attending to, and performing his necessary and lawful affairs, business, and occupation, and so long as said plaintiff shall live he will, by reason of said premises, be totally incapacitated, disabled, and prevented from attending to, transacting, and performing his lawful and necessary affairs, business, and occupation, to the damage of the said plaintiff $10,000.00; therefore he brings his suit.

FLICK & WESTENHAVER, *p. q.*

15 Endorsed: Filed March rules, 1888. S. H. Martin, clerk.

March rules, 1888.

Declaration filed and common order.

April rules, 1888.

Common order confirmed and W. E.

APRIL 12TH, 1888.

J. WILSON MARTIN, by JOHN W. MARTIN, as the Next Friend of the said J. Wilson Martin,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the Case.

This day came the Baltimore and Ohio Railroad Company, by its attorneys, and filed its petition and bond with good and sufficient surety, and asked the court to remove the above-entitled cause for reasons stated in said petition into the circuit court of the United States in and for the district of West Virginia.

In the Circuit Court of Berkeley County, State of West Virginia.

J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend, &c.,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Petition for Removal to the Circuit Court of the United States, for the District of West Virginia.

16 Your petitioner, the Baltimore and Ohio Railroad Company, respectfully represents that the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and that this petition is filed prior to the time or at the time the defendant is required by the laws of the State of West Virginia or by the rules of this court to answer or plead to the declaration or complaint of the plaintiff filed herein.

That this cause is a suit of a civil nature between J. Wilson Martin, by John W. Martin, his next friend, &c., as plaintiff, who were at the commencement of this suit and still are citizens of the State of West Virginia, and the Baltimore and Ohio Railroad Company as defendant, a corporation duly incorporated under the laws of the State of Maryland, and which was at the time of the institution of this suit and now is a citizen of said last-named State. Your petitioner has made and herewith files a bond with good and sufficient surety for its entering in the said circuit court for the district of West Virginia aforesaid, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and it prays the honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court

17 of the United States in and for the district of West Virginia, and it will ever pray.

FAULKNER & INGLES,
Attorneys for Defendant.

STATE OF MARYLAND, }
City of Baltimore. }

Samuel Spencer, being duly sworn, says that he is president of the Baltimore and Ohio Railroad Company, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

SAMUEL SPENCER.

Subscribed and sworn to before me, a justice of the peace of the State of Maryland in and for the city of Baltimore, the 14th day of March, 1888.

ROBERT A. THURSBY, *J. P.*

STATE OF MARYLAND, } *set:*
Baltimore City, }

I hereby certify that Robert A. Thursby, Esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice, and verily believe the signature to be his genuine signature.

18 In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city this 14th
[SEAL.] day of March, A. D. 1888.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

Know all men by these presents that we, the Baltimore and Ohio Railroad Company, as principal, and A. J. Thomas, as surety, are held and firmly bound unto J. Wilson Martin and John W. Martin, his next friend, &c., in the penal sum of five hundred dollars; the payment whereof well and truly to be made unto the said J. Wilson Martin and John W. Martin, his next friend, their representatives and assigns, we bind ourselves, our heirs, representatives, successors, and assigns, jointly and severally, firmly by these presents.

Whereas the Baltimore and Ohio Railroad Company has filed its petition in the circuit court, Berkeley county, State of West Virginia, asking for the removal to the circuit court of the United States in and for the district of West Virginia of a certain cause, wherein J. Wilson Martin, by John W. Martin, his next friend, &c., is plaintiff and The Baltimore and Ohio Railroad Company is defendant:

Now, the condition of the above obligation is such that if the said The Baltimore and Ohio Railroad Company shall enter in the
19 said circuit court of the United States for the district aforesaid, on the first day of its next session, a copy of the record in

said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, and shall do and perform all acts required by the laws of the United States to be done by it in the removal of said suit as aforesaid, then this obligation to be void; otherwise to remain in full force and virtue.

Witness the corporate name of the said The Baltimore and Ohio Railroad Company, by Samuel Spencer, its president, and its corporate seal and the name and seal of A. J. Thomas on the 14th day of March, 1888.

Seal Baltimore and Ohio Railroad Company.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By SAMUEL SPENCER, *President.* [SEAL.]
A. J. THOMAS. [SEAL.]

Attest: ANDREW ANDERSON, *Sec'y.*

Endorsed: Filed April 12th, 1888. S. H. Martin, clerk.

APRIL 24TH, 1888.

J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend, *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the Case.

20 This day came the plaintiff and offered to file his answer to the petition heretofore filed in which the defendant asked for a removal of this cause into the circuit court of the United States for the district of West Virginia, denying that said defendant is a non-resident of this State and has the right to remove this cause; to the filing of which answer the defendant objected; whereupon the court, upon consideration thereof, doth overrule said objection and said answer is accordingly thereupon filed, and the application of the Baltimore and Ohio Railroad Company, asking the court to remove this cause into the circuit court of the United States for the district of West Virginia, coming on to be heard upon the petition heretofore filed by said defendant, accompanying which is a good and sufficient bond, answer of plaintiff this day filed, and was argued by counsel, and the court, taking judicial notice of the statutes incorporating the defendant in Virginia and this State and being of opinion that said Baltimore and Ohio Railroad Company is not a non-resident corporation, refuses to allow said removal, and doth overrule the application and motion to have this cause removed into the circuit court of the United States for the district of West Virginia.

J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend,
vs.
21 THE BALTIMORE AND OHIO RAILROAD COMPANY.
} Trespass on the Case.

The answer of the plaintiff in this action to the petition of the defendant filed at a former day of this term praying a removal of this cause to the circuit court of the United States for the district of West Virginia.

This plaintiff, for answer to said petition, says that it is not true that said defendant owns and operates its railroad in the State of West Virginia by virtue of any Maryland law alone. Though it may also be a resident of the State of Maryland, it is likewise a resident of the State of West Virginia. It exists in this State as a corporation and has constructed and operated its road in this State by virtue of several acts of the Virginia and West Virginia legislature, which make it a domestic and resident corporation. Therefore the plaintiff denies that the said defendant is a non-resident corporation within the acts of Congress under which it seeks to remove this cause to the U. S. circuit court; but, on the contrary, the plaintiff says said defendant is for all the purposes of this suit a resident of the State of West Virginia, and therefore the plaintiff prays that the prayer of the defendant's petition may be refused.

J. WILSON MARTIN, *Per Counsel.*

FLICK & WESTENHAVER, *p. q.*

STATE OF WEST VIRGINIA, *Berkeley County,* } *To wit:*

22 John W. Martin, the plaintiff named in the foregoing answer, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information he believes them to be true.

JOHN W. MARTIN, *Plaintiff.*

Taken, sworn to, and subscribed before me this 24th day of April, 1888.

L. DE WITT GERHARDT, *Notary Public.*

Endorsed: Filed April 24th, 1888. S. H. Martin, clerk.

STATE OF WEST VIRGINIA, *County of Berkeley,* } *ss:*

I, S. H. Martin, clerk of the circuit court for county and State aforesaid, do hereby certify that the foregoing is truly taken from the records and proceedings of the circuit court for Berkeley county as full and entire as the same remain on record.

Seal Circuit Court Berkeley County, West Virginia.

In testimony whereof I hereto subscribe my name and affix the seal of the said circuit court, at Martinsburg, the 4th day of May, A. D. 1888.

S. H. MARTIN, *Clerk.*

23 Endorsed: J. Wilson Martin, by John W. Martin, his next friend, *vs.* The B. & O. Railroad Co. 383. Copy of record. Circuit court U. S., dist. of W. Va. Filed in office this 9th day of May, 1888. L. B. Dellicker, clerk. Clerk's fee for copy, $5.00.

And thereupon the defendant, by its counsel, filed its demurrer to the plaintiff's declaration and each count thereof.

And on another day, to wit, on the 23rd day of July, 1888, the following order was made and entered of record, to wit:

J. WILSON MARTIN, by JOHN W. MARTIN,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the Case.

On motion of the parties, and for reasons appearing to the court, it is ordered that this cause be removed to the circuit court of the United States for the district of West Virginia to be held at
24 Martinsburg on the first Tuesday in August next, for further proceedings to be had therein.

UNITED STATES OF AMERICA,
District of West Virginia. }

Pleas and proceedings before the circuit court of the United States for the district of West Virginia, at Martinsburg, W. Va., filed and had in the case of J. Wilson Martin, by John W. Martin, his next friend, *vs.* The Baltimore and Ohio Railroad Company, commencing on the 7th day of August, 1888.

J. WILSON MARTIN
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } Trespass on the Case.

This cause having been transferred to this court from the circuit court of the United States for the district of West Virginia, directed by law to be held at Parkersburg, in said district, by an order of said last-named court, and the papers in said cause, together with a transcript of the proceedings in said court, being now presented to the court—

It is ordered that this cause be docketed in this court for further proceedings to be had therein.

THURSDAY, *December 13th*, 1888.

J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend, *vs.* THE BALTIMORE & OHIO RAILROAD CO. } Trespass on the Case.

25 This day came the parties, by their attorneys, and the plaintiff, by his attorney, filed his plea in abatement No. 1; to which plea the defendant, by its attorney, demurred, and the plaintiff, by his attorney, joins in the said demurrer; and thereupon, the matters arising upon said motion being argued by counsel, it is considered by the court that said demurrer be sustained and said plea held for naught.

And thereupon the plaintiff moved the court to remand this action to the circuit court of Berkeley county, which motion the court overruled.

And the defendant's demurrer to the declaration coming on for consideration and no reason being alleged in support thereof, the court doth overrule said demurrer. Thereupon the defendant pleads not guilty to the declaration and of this puts itself upon the country and the plaintiff doth likewise, and issue is thereupon joined, and, on motion of the defendant, it has leave to file a special plea in sixty days from the rising of this court, and, it being suggested to the court that the infant plaintiff, J. Wilson Martin, arrived at the age of 21 years on the 2nd day of December, 1888, and desires to continue the prosecution of this action in his own name and behalf, it is so ordered, and this cause is continued.

In the Circuit Court of the United States for the District of West Virginia.

26 J. WILSON MARTIN, by JOHN W. MARTIN, His Next Friend, *vs.* THE B. & O. R. R. COMPANY. } At Law. Trespass on the Case.

And the said plaintiff, J. Wilson Martin, by John W. Martin, his next friend, comes and says that this court ought not to have or take any further cognizance of the action aforesaid, because he says that before and at the time the said action was removed from the circuit court of Berkeley county, State of West Virginia, to this court, upon the application and petition of the defendant, The Baltimore and Ohio Railroad Company, the said petitioner was and is now a resident of the district of West Virginia and is therefore not entitled to remove said action to this court, and this the said plaintiff is ready to verify; wherefore he prays judgment whether this court can or will take any further cognizance of the action aforesaid.

FLICK & WESTENHAVER, *p. q.*

DISTRICT OF WEST VIRGINIA:

In the Circuit Court of said District.

I, J. Wilson Martin, the plaintiff named in the foregoing plea, being duly sworn, say that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information I believe them to be true.

J. WILSON MARTIN, *Plaintiff.*

27 Taken, sworn to, and subscribed before me this 13th day of December, 1888.

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

Endorsed: J. Wilson Martin, by J. W. Martin, his next friend, *vs.* The B. & O. R. R. Co. At law. Trespass on the case. Plaintiff's plea in abatement No. 1. Filed in open court Dec. 13, 1888. L. B. Dellicker, cl'k.

THURSDAY, *October* 17*th*, 1889.

J. WILSON MARTIN
vs.
THE BALTIMORE & OHIO RAILROAD CO. } In Case.

This day came the parties, by their attorneys, and thereupon the defendant tendered a special plea of release in writing, to the filing of which the plaintiff objected, and thereupon the court overruled the objection, and the plea is ordered to be filed; and thereupon the plaintiff filed his demurrer in writing to said plea, in which demurrer the defendant joins, and the matters of law arising on said plea being fully heard the court takes time to consider thereof.

28 FRIDAY, *October* 18*th*, 1889.

J. WILSON MARTIN
vs.
THE BALTIMORE & OHIO RAILROAD CO. } In Case.

This day came again the parties, by their attorneys, and the court, having considered the matters of law arising on said demurrer to defendant's plea of release, doth overrule said demurrer; to which action of the court the plaintiff, by his attorneys, excepts and tenders to the court his first bill of exceptions and prays that they may be signed, sealed, and enrolled and made a part of the record, which is accordingly done; and thereupon the plaintiff files his general replication in writing to said plea of release; to which the defendant rejoined generally, and issue was thereupon joined; and the said plaintiff files his special replication of infancy in writing to

said plea of release; to which replication the defendant filed his demurrer to said special replication, and the plaintiff joined in said demurrer, and the court, having considered said demurrer, doth sustain the said demurrer, and that said special replication be held for naught; whereupon the plaintiff tenders his second bill of exceptions, which he prays the court may be signed, sealed, and made part of the record, which is accordingly done.

(*Bill of Exceptions No.* 1.)

29 J. WILSON MARTIN
vs.
THE B. & O. R. R. Co.

Be it remembered that during the trial of this cause the defendant filed his special plea of release, which is in words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia, at Martinsburg Sitting.

J. WILSON MARTIN, JR.,
vs.
B. & O. R. R. COMPANY.

For further plea in this behalf the defendant says that the plaintiff heretofore, to wit, on the 19th day of November, 1886, was in and desired to continue in the service and employment of the Baltimore and Ohio Railroad Company, in its telegraph department, and applied to be admitted a member of the Baltimore and Ohio Employees' Relief Association, a corporation organized under the laws of the State of Maryland, and thereby agreed to conform and be bound by the constitution, by-laws, rules, and regulations of said association then in force and recognized by said association, and also to conform to and be bound by such additional by-laws, rules, regulations, and amendments of the constitution of said association as might thereafter be adopted by its committee of management; which application was in writing and signed by the said J. Wilson Martin, Jr., in his own proper handwriting.

30 And amongst other things the said plaintiff agreed that such his application, when approved by the secretary of the said association, should constitute a contract between himself and the said Baltimore and Ohio Railroad Company as a condition of his employment by the said company, and as such be the irrecoverable power and authority of said company to make the deductions and payments mentioned and agreed upon in said application, and then when so approved said application should likewise constitute the assignment in advance to the said Baltimore and Ohio Employees' Relief Association of such portion of his wages, which should have precedence over any other assignments by him of his wages or of any claim upon them on account of liabilities incurred by him.

And the said plaintiff further agreed that in consideration of the contribution of the Baltimore and Ohio Railroad Company to said association and of the guarantee by said railroad company of the payment of the benefits aforesaid, the said railroad company — not be liable to any claim or suit by reason of any accident happening to him while employed in any manner in the service of said company, whether said accident should be caused by the negligence of said company, its officers or agents, or otherwise, except as guarantor of the benefits payable to him or his beneficiary under the terms of his application and agreement.

He further agreed that the said association may require as
31 the condition precedent to the payment of such benefits that all acts deemed appropriate or necessary by the secretary of said association to effectuate the release and discharge of said company be done by those who might bring suit for damages by reason of such injuries or death.

And the said plaintiff further understood and agreed that his said application, when the acceptance therein should be indorsed thereon by the secretary of said association and said Baltimore and Ohio Railroad Company, by which contract his rights as a member of said association and as an employee of said railroad company should be determined as to all matters within its scope; all which, amongst other things, are in said application set forth, and which application was accepted by the secretary of the said association and thereby constitute the contract aforesaid between the said John Wilson Martin, Jr., the said plaintiff, and the said defendant.

And the defendant further says that the said John Wilson Martin, Jr., plaintiff, was then and there and continued to be and remained a servant and employee of the said defendant, and took upon himself the dangers and risks of personal injury from the neglect of other employees, agents, and officers of said company, and afterwards, to wit, on the 22nd day of May, 1887, was injured by an accident that happened on the road of said company.

32 And that afterwards, to wit, on the 22nd day of September, 1887, and on the 1st day of December, 1887, and on the 24th day of December, 1887, and on the 21st day of January, 1888, and on the 21st day of February, 1888, and on the 25th day of March, 1888, and on the 22nd day of May, 1888, and on the 11th day of July, 1888, the said plaintiff received, under the rules and regulations of the Baltimore and Ohio Employees' Relief Association and in accordance with the constitution and by-laws thereof, certain sums of money, amounting in the aggregate to $240.00, being full allowances which, as a member of said association, he was entitled to receive for the periods mentioned in said receipts and releases by reason of injury received while in the discharge of duty in the services of the Baltimore and Ohio Railroad Company, and did thereby release and forever discharge the said company from all claims or demands for damages, indemnity, or other form of compensation he then or might or could thereafter have against the said company by reason of said injuries, which said receipts and releases were sev-

erally signed and sealed and delivered to said association by the said plaintiff, in accordance with said contract.

Wherefore the said defendant says that the said plaintiff hath released and discharged the defendant from all claims and demands for damages by reason of the injury in the plaintiff's declara-
33 tion mentioned, and this it is ready to verify. Wherefore it prays judgment whether said plaintiff ought to have or maintain his aforesaid action against it.

BALTIMORE & OHIO R. R. CO.,
By Counsel.

JNO. A. HUTCHINSON,
Att'y for Def't.

(Endorsed:) J. Wilson Martin, Jr., *vs.* B. & O. R. R. Co. Plea release. Filed in open court Oct. 17th, 1889. L. B. Dellicker.

And the plaintiff filed then his demurrer, which is in the words and figures following, to wit:

In Circuit Court of United States for District of West Va.

J. WILSON MARTIN
vs.
THE B. & O. R. R. Co.

This day came the plaintiff, by his attorneys, and demurs to the defendant's special plea of release and says the same is not sufficient in law.

(Endorsed:) J. Wilson Martin *vs.* B. & O. R. R. Co. Dem. to plea. Filed in open court this 17th day of Oct., 1889. L. B. Dellicker, clerk.

34 And the defendant having joined in said demurrer, the court, upon consideration thereof, overruled said demurrer; to which action of the court in overruling said demurrer the plaintiff, by his attorneys, excepts and tenders this his first bill of exceptions, which he prays may be signed, sealed, and enrolled as a part of the record, which is accordingly done.

HUGH L BOND, *C't Judge.* [SEAL.]

(Endorsed:) J. Wilson Martin *vs.* Balto. & Ohio R. R. Co. 1st bill of exceptions.

In the U. S. Circuit Court for the District of West Virginia.

J. WILSON MARTIN
vs.
THE B. & O. R. R. Co.

And the said plaintiff, for replication to the special plea of release filed by the said defendant, comes and says that he ought not to be precluded from having and maintaining his action aforesaid because of anything in said plea alleged, because he says that the allegations and statements in said plea contained are not true; and of this he puts himself upon the country.

J. WILSON MARTIN,
By Counsel.

FLICK & WESTENHAVER, *His Att'ys.*

35 (Endorsed:) J. Wilson Martin *vs.* Balto. & Ohio R. R. Co Replication. Filed in open court this 18th day of Oct., 1889 L. B. Dellicker, clerk.

(*Bill of Exceptions No.* 2.)

J. WILSON MARTIN
vs.
THE B. & O. R. R. Co.

Be it remembered that during the trial of this cause and after the action of the court set forth in the plaintiff's first bill of exceptions the plaintiff filed his special replication of infancy to said plea of release; which replication is in the words and figures following, to wit:

In the U. S. Circuit Court for the District of West Virginia.

J. WILSON MARTIN
vs.
THE B. & O. R. R. Co.

And for further replication to defendant's special plea of release the said plaintiff comes and says that he ought not to be precluded from maintaining his action aforesaid, for that, at the time of the making of the application in writing for membership in the Baltimore & Ohio Employees' Relief Association and of the said several supposed releases in said special plea of release set forth, the said plaintiff was an infant within the age of 21 years, to wit, of
36 the age of 19 years; and this the said plaintiff is ready to verify.

J. WILSON MARTIN,
By Counsel.

FLICK & WESTENHAVER, *His Att'ys.*

(Endorsed:) J. Wilson Martin *vs.* Balto. & Ohio R. R. Co. Replication. Filed in open court this 18th day of Oct., 1889. L. B. Dellicker, clerk.

To which replication the defendant filed its demurrer, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN
vs.
B. & O. R. R. Co. } In Case.

And the defendant comes and demurs to the special replication of infancy filed by the plaintiff to the plea of release filed by the defendant in this action and says the same is not sufficient in law. Wherefore, &c.

BALTO. & O. R. R. CO.,
By Counsel.

JNO. A. HUTCHINSON,
Att'y for Def't.

37 (Endorsed:) J. Wilson Martin *vs.* B. & O. R. R. Co. Demurrer to replication. Filed in open court this 18th day of Oct., 1889.

And the plaintiff having joined in said demurrer, the court, upon consideration thereof, sustained said demurrer; to which action of the court in sustaining said demurrer the plaintiff, by his attorneys, excepts and tenders his second bill of exceptions, which he prays the court may be signed, sealed, and enrolled as a part of the record, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

(Endorsed:) John Wilson Martin *vs.* Balto. & Ohio R. R. Co. 2nd bill of exceptions.

FRIDAY, *October* 18*th*, 1889.

J. WILSON MARTIN
vs.
THE BALTIMORE & OHIO RAILROAD CO. } In Case.

This day came again the parties, by their attorneys, and thereupon came a jury, to wit, S. V. Yantis, M. D. Neville, James V. Moore, F. V. Williams, J. P. Kearfott, John G. Lewis, T. R. Rogers,
David Fox, Samuel Freeze, Thomas Martin, Caleb Knight,
38 and Edward M. Pancake, twelve lawful men selected, true, and sworn to well and truly try the issue joined in this cause and a true verdict render according to the law and the evidence,

who, having heard the evidence, arguments of counsel, and instructions of the court, on their oaths do say: "We, the jury, on the issues joined find for the defendant under the instructions of the court."

HUGH L. BOND, *C't Judge.*

SATURDAY, *October* 19*th*, 1889.

J. WILSON MARTIN
vs.
THE BALTIMORE & OHIO RAILROAD CO. } In Case.

This day came again the parties, by their attorneys, and the plaintiff, by his attorney, moves the court to set aside the said verdict and grant him a new trial; which motion the court overruled; to which action of the court in overruling the said motion and refusing a new trial the plaintiff, by his attorney, excepted and tenders his fifth bill of exceptions and prays that the same may be signed, sealed, and enrolled, which is accordingly done, and, the court proceeding to enter judgment upon said verdict, it is considered by the court that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of the plaintiff
39 its costs by it — by him in this behalf expended.

MEMORANDUM.—During the trial of this cause the plaintiff excepted to certain instructions given by the court to the jury and tendered his third and fourth bills of exception and prayed that the same might be signed, sealed, and enrolled, which was accordingly done.

HUGH L. BOND, *C't Judge.*

(*Bill of Exceptions No.* 3.)

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN
vs.
B. & O. R. R. COMPANY.

Be it remembered that in the trial of this cause the plaintiff, to maintain the issues upon his part, read in evidence to the jury the deposition of John C. Stewart, which is in the words and figures following, to wit:

Notice to Take Deposition.

In the Circuit Court of the United States for the Dist. of West Virginia.

J. WILSON MARTIN, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

To said defendant:

Take notice that the depositions of J. S. Turner and others will be taken at the office of Robert R. Henderson, in the city of Cumberland, in the county of Allegheny and State of Maryland, on the 8th day of July, 1889, between the hours of 9 a. m. and 6 p. m., to be read in evidence on the hearing of the above cause in behalf the said plaintiff.

If from any cause the taking of the same shall not be commenced or, being commenced, shall not be completed on that day, the taking of the same will be adjourned from time to time until they are completed.

Yours, &c., J. WILSON MARTIN,
Per Counsel.

(Endorsed.)

UNITED STATES OF AMERICA, *District of West Virginia*, } *To wit:*

Personally appeared before the undersigned, L. De Witt Gerhardt, a notary public in and for the State of West Virginia, John W. Martin, who, being by me first duly sworn, made oath that he served the within notice upon the Baltimore and Ohio Railroad Company by delivering a true copy thereof to John T. Martin, at Martinsburg, in the district of West Virginia, he, the said John T. Martin, then being a station agent of said company at said place and in the actual employment of said company, and also by delivering a true copy thereof to E. Boyd Faulkner, he being the attorney of said company.

Given under my hand and notarial seal this 27th day of June, 1889.

[Seal L. De Witt Gerhardt, Notary Public, Berkeley Co., W. Va.]

L. DE WITT GERHARDT.

41 United States Circuit Court for the District of West Virginia.

J. WILSON MARTIN,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

To J. S. Turner, Ferdinand Clements, John Stewart, George Trader, and Charles Bailey:

Take notice that you are required to be examined *de bene esse* on the part of the plaintiff in the above-entitled cause before me, Robert R. Henderson, a commissioner duly appointed by the circuit court of the United States for the district of Maryland, under and by virtue of the statutes of the United States in such case made and provided, at my office, number 12 South Liberty street, in the city of Cumberland, Allegheny county, Maryland, on the eighth day of July, 1889, at nine o'clock in the forenoon of that day, at which time and place you are hereby required to be present and testify.

Witness my hand and official seal, at Cumberland, this first day of July, 1889.

[Seal Commissioner Circuit Court United States for the District of Maryland.]

ROBERT R. HENDERSON,
United States Commissioner.

(Endorsed:) Turner, Trader, and Clements "*non est.*" Summoned John Stewart, Charles Bailey. (Signed) U. S. Martin, U. S. dept. marshal.

42 (*Deposition.*)

UNITED STATES OF AMERICA,
District of Maryland, State of Maryland, County of Allegheny, } *ss:*

Be it remembered that on the eighth day of July, in the year eighteen hundred and eighty-nine, I, Robert R. Henderson, a commissioner duly appointed by the circuit court of the United States for the district of Maryland, in the said circuit, under and by virtue of the statutes of the United States in such case made and provided, did call and cause to be and personally appear before me, at my office, in the city of Cumberland, in the district of Maryland, in the State aforesaid, Charles M. Bailey and John C. Stewart, to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of West Virginia, wherein J. Wilson Martin is plaintiff and The Baltimore and Ohio Railroad Company is defendant, and that on said day I did adjourn the hearing of said witnesses until July 9th, at nine o'clock a. m., and so notified the witnesses and the counsel for

plaintiff and defendant; and that on said July 9th the said witnesses appeared before me, and the said John C. Stewart,
43 being about the age of twenty-one years, and having been first by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine him, the said John C. Stewart, upon the following interrogatories propounded by D. C. Westenhaver, Esq., who appeared before me as counsel for the plaintiff in said cause, and the said John C. Stewart did thereupon depose and testify as hereafter set forth in full, there being also present before me A. Hunter Boyd, Esq., counsel for the defendant, The Baltimore and Ohio Railroad Company.

Following is the testimony of JOHN C. STEWART, a witness of lawful age, produced on behalf of the plaintiff:

(The defendant, by its counsel, A. Hunter Boyd, objected to the taking of the testimony of Mr. Stewart on the ground that he was not named in the notice of the taking of the testimony served on the defendant.)

The following interrogatories were propounded to the witness by D. C. WESTENHAVER, Esq., for plaintiff:

Interrogatory 1. What is your age, residence, and occupation?

Ans. My age is 21 years on 3rd day of August next. My residence is Central Station, Doddridge county, West Virginia. I principally follow building and repairing telegraph lines.

44 Int. 2. How long have you been engaged in that business?

Ans. Almost three years; can't say exactly.

Int. 3. In whose employ have you been and under what foreman or superintendent have you worked?

Ans. Foreman J. S. Turner, in the employ of the Baltimore and Ohio Company—the telegraph company, I suppose—until the deal between that company and the Western Union Telegraph Company, and since that time in the Western Union Company, I suppose.

Int. 4. Do you recall an accident or collision which occurred at Bay View Junction Sunday, May 22nd, 1887, in which J. Wilson Martin and some others were injured?

Ans. Yes, sir; I know that an accident happened on May 22nd, 1887.

Int. 5. Where were you at the time it happened?

Ans. I was in the car where we sleep. I had just got out of my bed and put on my shoes when it happened.

Int. 6. State all you know about the circumstances of the collision, how it occurred, who were injured, and all about it.

Ans. As I was only inside the car, I could not see any switches being thrown or closed. John Martin was injured, Oliver Buckalew, and James Hare; Snowden Clements was killed.

45 Int. 7. Describe in what way this collision caused the injury of these parties.

Ans. Those parties were standing between the cook-car and sleeping car, on the platform between the two cars. Martin, he was sit-

ting on the brake wheel. The engine running into the cars mashed the two cars together and caught those folks in between.

Int. 8. What was broken about the bumpers or platforms of those two cars?

Ans. One end of the cook-car was mashed in; the step was mashed off. I couldn't say about the sleeping car.

Int. 9. State if you noticed what was the condition of the timbers at the end of the cook-car, where you say it was mashed in.

Ans. They had begun to rot some, or decay.

Int. 10. Were you all travelling or standing still when the collision took place?

Ans. Our cars were standing still when the collision happened.

Int. 11. How many cars were there in your train?

Ans. We had a sleeping car, a cook-car, a material car, and I think also a gondola car, but I am not certain about the gondola. There was another camp on the side track where we were laying.

Int. 12. How many cars were there between the car where
46 Mr. Martin and these parties were and the end where the engine struck?

Ans. I could not say about that.

Int. 13. Were there any; and, if so, about how many?

Ans. Yes, sir; there was one; that sleeeping car and two more, I can say, anyway.

Int. 14. To what extent, if at all, were those other cars between yours and the engine crushed or injured by the collision?

Ans. Yes, sir; I think there was one car that had the steps mashed off it, and, I guess, the bumper.

Int. 15. Which one was it?

Ans. I think it was one belonging to John Zepp's camp.

Int. 16. State if you know at what rate of speed the engine was going when it struck your train.

Ans. I did not see the engine till it struck our train.

Int. 17. Had the timbers in the steps or platform not been rotten or decaying would the force of the collision have broken the platform and crushed the cars together?

(Objected to by Mr. Boyd, counsel for defendant.)

Ans. I could not say about that.

Int. 18. State if you know how far apart were the upright pieces of the ends of these two cars.

47 Ans. They was pressed together, which held the men between until we got the cars apart.

Int. 19. What was Martin's condition when you got him out?

Ans. I could not tell you how he was placed in there after the wreck.

Int. 20. Were these cars that you were transported in the same that you used to live in while working on the telegraph lines?

Ans. We boarded and slept in those cars.

Int. 21. Where had you last been at work before this accident occurred and to what point were you then going?

Ans. We was working, to the best of my knowledge, on the third

division, Keyser, I think; between there and Piedmont somewhere. I was told we was on our way to Philadelphia.

Int. 22. What kind of cars were they that you used to eat and sleep in?

Ans. I suppose they was baggage and passenger cars before they were turned into camp cars.

Int. 23. How long had you been with this camp before the accident?

Ans. I couldn't tell you just how long; probably not quite a year.

Int. 24. During the time you speak of had these cars ever been inspected or ever turned in for general repairs?

Ans. I couldn't say whether they were inspected, but they had never been turned in for repairs.

48 Int. 25. Were those cars sufficiently sound to be safe to transport passengers?

Objected to by Mr. Boyd, for defendant.

Ans. No, sir; I wouldn't think that they was.

Int. 26. What, if anything, do you know as to their condition at that time, upon which you base this statement?

Objected to by Mr. Boyd, for defendant.

Ans. Well, nothing, only that when we was riding in the cars the foreman told me I had better sleep with my pants on in case anything happened.

(Answer objected to by Mr. Boyd in so far as it goes (to) what the foreman said.)

Int. 27. Who was foreman?

Ans. John S. Turner.

Int. 28. Who hired and discharged the men who worked on this camp and who directed when and where they should work?

Ans. Mr. Turner hired me, anyway. I suppose he could have discharged me, if he would. He ordered the men what to do.

Int. 29. How far is Central, where you live, from Martinsburg?

Ans. It is more than one hundred miles.

* * * * * * *

Cross-examination of Mr. Stewart was waived by A. Hunter Boyd, Esq., counsel for defendant.

And further the deponent sayeth not.

(Signed) JOHN C. STEWART.

49 And the deposition of Charles M. Bailey, which is in the following words and figures, to wit:

And the said Charles M. Bailey, being about the age of 24 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles M. Bailey upon the interrogatories hereinafter following, propounded by D. C. Westenhaver, Esq., counsel for the plaintiff, and upon the cross-interrogatories propounded by A. Hunter Boyd, Esq., counsel

for the defendant, and he did thereupon depose, testify, and say as hereinafter follows:

CHARLES M. BAILEY, a witness of lawful age, produced on behalf of plaintiff, being duly cautioned and sworn to testify the whole truth, and carefully examined, did thereupon depose as follows:

(The defendant, by its counsel, A. Hunter Boyd, objected to the taking of the testimony of the witness Bailey on the ground that he was not named in the notice of the taking of the testimony served on defendant.)

Interrogatory 1. State your age, residence, and occupation.

Ans. My age is 24 years; residence, Parkersburg, Wood county, West Virginia. I am working on the construction of telegraph lines.

Int. 2. How far is Parkersburg from Martinsburg, West Virginia?

50 Ans. About two hundred and eighty-four miles.

Int. 3. About the 22nd of May, 1887, were you working in the same business; and, if so, under what foreman?

Ans. Yes, sir; I was working under J. S. Turner for the Baltimore and Ohio Telegraph Company.

Int. 4. Do you recall any accident that occurred at Bay View Junction on Sunday, May 22nd, 1887, in which Mr. Martin and some others were injured?

Ans. Yes, sir; I do.

Int. 5. Please state all you may know about the occurrences in said accident.

Ans. I had just washed and was wiping when I heard the engine blow for a switch. I ran out to the platform just in time to see the switchman run out and throw the switch. As soon as he threw the switch the trainmen who were standing around commenced to hollow to us campmen to look out, just as the engine struck the camp train. I felt no jar myself, but happened to hear the boys between the other two cars halloaing. I jumped down and ran to see what was the matter, and seen that the two cars had been telescoped and the platforms mashed down together under the cars.

Int. 6. At which end were you, next to the end that was struck or farther from the engine than where these boys were hurt?

51 Ans. I was on the farthest end of the sleeping car nearest to the engine.

Int. 7. Where were the parties who were hurt?

Ans. They were standing on the two platforms between the sleeping and the cooking car.

Int. 8. What breaking was it that caused their injury?

Ans. The mashing or breaking of the beams that held the platform of each car together, which beams run the full length of each car.

Int. 9. What was the condition of those beams at the place where broken?

Ans. Very rotten.

Int. 10. How close together were the ends of the two cars between which the men were imprisoned?

Ans. Not more than two feet apart.

Int. 11. What men were injured, and in what positions were they when you got there?

Ans. The injured were John Martin, James Hare, Oliver Buckalew. Snowden Clements was killed. As near as I can recollect, John Martin was pinned between the brake wheel and the two iron frames of the platforms. Snowden Clements and Oliver Buckalew were cut between the solid frames of the two cars; they were standing on the lower steps of the platforms. I can't recollect James Hare's position.

Int. 12. Were one or both platforms broken?

52 Ans. Both.

Int. 13. How many cars were there, in the train in which yours was and how far was yours from the end struck by the engine?

Ans. I think there were about ten cars in all in the train. There were three cars between the men who were struck and the engine.

Int. 14. To what extent were those cars between where these parties were hurt and the end struck by the engine crushed or broken?

Ans. The car belonging to John Zepp's camp had its bumper broken off and the end damaged slightly.

Int. 15. Can you tell at what rate of speed the engine was going when it struck your train?

Ans. About four or five miles an hour.

Int. 16. Had these beams connecting the platforms been sound and in good condition would the force of the collision have had any effect upon them? If so, what?

Objected to by Mr. Boyd, for defendant.

Ans. I don't think it would have had any effect at all in any way. I am sure of it.

Int. 17. What kind of cars were your sleeping and cooking cars which were damaged?

Ans. Cars that had been used as passenger and baggage cars combined.

Int. 18. How long had you been with them before the accident occurred?

53 Ans. A month, to the very day.

Int. 19. During that time had they been inspected or subject to general repairs?

Ans. They had been inspected and considered as unsafe, but had not undergone any repairs.

Int. 20. Unsafe for what purpose, do you mean?

Ans. For riding or transporting people.

Int. 21. Where had you been last working before the day in question and to what point were you then going?

Ans. We had been working on the third division, between Piedmont and Keyser, lying at a place called Red Rock. We were then on our way to Chester, Penn-sylvania.

Int. 22. How were you taken from the place where you were working to the point at which the accident occurred?

Ans. On a regular freight train—a train called "the pick up."

Int. 23. What connection, if any, did the members of your camp have with the running of the train then carrying you?

Ans. None at all.

Int. 24. Then, as I understand you, your cars were merely attached to this train, which had a conductor and a crew of its own who controlled and operated it. Is that correct?

Objected to as leading by Mr. Boyd, for defendant.

54 Ans. Yes, sir.

Int. 25. Were you on duty this day when the accident occurred, or, rather, was Mr. Martin and the members of your camp who were engaged in constructing telegraph lines on duty?

Ans. No, sir.

Int. 26. What compensation, if any, did the members of the camp receive on this day?

Ans. Nothing.

Int. 27. Who hired and discharged men in this camp in which you were working, and who directed when and where they should work?

Ans. J. S. Turner, as far as I know, hired and discharged and also directed the men where and when to work.

Int. 28. State, if you know, whether Mr. Turner knew the condition of unsoundness of these cook and camp cars.

Ans. As to that, I do not know.

Int. 29. State, if you know, who the party was that threw the switch to which you have referred and what switch it was.

Ans. I can't remember his name. It was the switch that came into the same track our train was standing on.

Int. 30. How far was the end of your train that was struck from that switch?

Ans. I do not know exactly, but three or four car lengths.

Int. 31. About how far was the engine from the switch when it was thrown? And state also if the switch was in a position that it could have been seen by the engineer on the engine.

55 Ans. I don't remember how far it was, but I think the engineer could see it, but not until it was too late.

Cross-examined by Mr. Boyd, counsel for defendant:

Cross-interrogatory 1. In answer to the fifth interrogatory-in-chief you say: I ran out to the platform just in time to see the switchman run out and throw the switch. Do you know who the switchman was?

Ans. No, sir.

X Int. 2. Do you know whether he was a regular switchman of the defendant?

Ans. I could not say that he was.

X Int. 3. In answer to the 19th interrogatory you say that the

cars referred to had been inspected. By whom were they inspected?

Ans. By the repairmen at each end of the divisions.

X Int. 4. Did those repairmen report to you?

Ans. Not personally. I just heard them saying they were unsafe.

X Int. 5. Were the cars connected with your camp moved by freight trains or passenger trains?

Ans. By freight trains always.

X Int. 6. What day of the week did this accident occur?

Ans. Sunday.

And further this deponent sayeth not.

CHARLES M. BAILEY.

56 There being no further witnesses produced before me, and neither party desiring further time, I did thereupon, on said 9th day of July, 1889, close and adjourn said hearing.

ROBERT R. HENDERSON,
United States Commissioner.

UNITED STATES OF AMERICA, }
District of Maryland, State of Maryland, County of Allegheny, } *ss:*

I, Robert R. Henderson, a commissioner duly appointed by the circuit court of the United States for the district of Maryland, under and by virtue of the statutes of the United States in such case made and provided, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the witnesses John C. Stewart and Charles M. Bailey do each live at a greater distance than one hundred miles from the place of trial of the case of J. Wilson Martin against The Baltimore and Ohio Railroad Company, pending in the circuit court of the United States for the district of West Virginia, at Martinsburg, in said district, in which case the said witnesses were by me examined.

I further certify that on the eighth day of July, in the year eighteen hundred and eighty-nine, I was attended at my office in Cumberland by M. T. Ingles, Esq., counsel for the defendant in said above-mentioned case, and by the witnesses John C. Stewart
57 and Charles M. Bailey, who are of sound mind and lawful age, and that I did on said day adjourn the taking of depositions and the examining of the witnesses in said case until the 9th day of July, 1889, at nine o'clock a. m., and notified the witnesses and the parties to said cause of said adjournment, and that on said 9th day of July, 1889, at nine o'clock a. m., I was attended in my office aforesaid by D. C. Westenhaver, Esq., counsel for plaintiff, and by A. Hunter Boyd, Esq., counsel for defendant, and by the said witnesses John C. Stewart and Charles M. Bailey, and the said witnesses were by me first carefully examined and cautioned and sworn to tell and testify the whole truth, and the depositions were by me reduced to writing in the presence of the said witnesses and from

their statements, and after carefully reading the same to the witnesses aforesaid they, the said John C. Stewart and Charles M. Bailey, subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing and returning the same under my own hand and seal to the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption. I also return herewith the notice of the taking of
58 the said depositions filed with me by the plaintiff.

In testimony whereof I have hereunto set my hand and seal this ninth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and that of the Independence of the United States the one hundred and fourteenth.

{Seal Commissioner Circuit Court United States for the District of Maryland.}

ROBERT R. HENDERSON,
United States Commissioner, Circuit Court of the United States for the District of Maryland.

(Endorsed.)

Costs of Depositions.

Commissioner, 5 subpœnas	$1 25
2 oaths	20
Taking depositions, 35 folios @ 20c.	7 00
	$8 45
Marshall:	
Summoning 2 witnesses	$1 00
Witnesses:	
C. M. Bailey, 2 days attendance & mileage	8 00
J. C. Stewart, 2 days attendance & mileage	8 00

And the deposition of Charles P. Carr, which is in the words and figures following, to wit:

Notice to Take Depositions.

59 In the Circuit Court of United States for the District of West Va.

J. WILSON MARTIN, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant.

To said defendant:

Take notice that the depositions of Dr. Wm. Mitchell and others will be taken at the office of W. H. H. Raleigh, N. W. cor. of Hop-

kins place and German street, in the city of Baltimore and State of Maryland, on the 2 day of July, 1889, between the hours of 9 a. m. and 6 p. m., to be read in evidence on the hearing of the above cause in behalf the said J. Wilson Martin.

If from any cause the taking of the same shall not be commenced, or, being commenced, shall not be completed on that day, the taking of the same will be adjourned from time to time until they are completed.

Yours, &c., J. WILSON MARTIN,
By Counsel.

(Endorsed.)

UNITED STATES OF AMERICA, *District of West Virginia*, } *To wit:*

Personally appeared before me, L. De Witt Gerhardt, a notary public for Berkeley county, West Virginia, John W. Martin, who, being duly sworn, makes oath that he did on this 21st day of June, 1889, serve the within notice on the Baltimore and Ohio Railroad Company by delivering a true copy thereof to John T. Martin,
60 at Martinsburg, in said district, he, the said John T. Martin, then being the station agent of said company at Martinsburg and in the actual employment of said company, and also by delivering at the same time and place a true copy thereof to E. Boyd Faulkner, attorney of said company in said suit.

Given under my hand and seal this 21st day of June, 1889.

[Seal L. De Witt Gerhardt, Notary Public, Berkeley Co., W. Va.]

L. DE WITT GERHARDT.

(*Deposition.*)

Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY (a Corporation), Defendant. } At Law.

* * * * * * *

Depositions of witnesses in the above-entitled cause taken on behalf of the plaintiff, in pursuance of notice hereto annexed, this 2nd day of July, A. D. 1889, at 10 o'clock a. m.

* * * * * * *

Present: D. C. Westenhaver, on behalf of the plaintiff, and W. Irvine Cross, on behalf of the defendant.

* * * * * * *

61 CHARLES D. CARR, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to tell the whole truth, deposes and says as follows:

Quest. 1. What is your residence and occupation?

Ans. I reside in Philadelphia, Pa.; am a fireman on the Baltimore & Ohio railroad.

Quest. 2. In what business and where were you engaged about the 22nd of May, 1887?

Ans. At Bay View, on engine # 321.

Quest. 3. Do you recall the collision which occurred at that time at Bay View Junction in which some parties were injured?

Ans. I can remember it.

Quest. 4. Please state all you may know about the occurrence of said accident, how it happened, who were hurt, &c.

Ans. As we were approaching Bay View the engineer blew four blows for the switch. Upon approaching the switch the inside switch from the main track was wrong, which let us on No. 1 track against the camp cars. The engineer done all that was in his power to avoid the accident. I believe there was one man killed and three others hurt.

Quest. 5. In what way was the switch you speak of wrong and how did it come to be wrong?

Ans. We wanted to go down on # 3 or # 4 track; I do not remember which, but how the switch came to be left wrong I do not know.

62 Quest. 6. Do you mean by being wrong that it was open when it should have been shut, or what?

Ans. I suppose it should have been shut.

Quest. 7. Who, if anybody, was in charge of the switches that you have spoken of?

Ans. There was nobody at all; they had no switchman.

Quest. 8. Was this a yard or junction of the railroad company at which considerable shifting of trains from one track to another was done?

Ans. No more than a yard, I don't suppose.

Quest. 9. How many tracks and switches were there in this yard?

Ans. I can't tell, as I never counted them.

Quest. 10. Give us an estimate of the number. Were there as many as a dozen?

Ans. I do not think there were.

Quest. 11. In shifting trains at this yard, who performed the duties of switchman?

Ans. The trainmen.

Quest. 12. Who was engineer of the train on which you were fireman?

Ans. John Warfield.

Quest. 13. How many cars were there in the train against which your train run?

Ans. I do not know.

Quest. 14. To what extent were the cars wrecked?

Ans. I can't tell, because I did not go to examine or see.

63 Quest. 15. How far from the end you struck were the men who were hurt?

Ans. I think it was the third or the fourth car; I do not remember which.

Question 16. Will you describe the breakage or damage to the car where these men were that caused them to be hurt?

Ans. I won't say positively whether it was the platform of the car gave way or what it was, because I do not remember.

Quest. 17. Did the platforms of any of the cars between theirs and the end you struck give away?

Ans. I do not know any more than what I was told, because I stayed on the engine myself.

Quest. 18. To what extent was your engine and train of cars damaged?

Ans. The engine was not damaged any, but about the cars I can't tell.

Quest. 19. In answer to question 4 you say that your engineer blew four blows for the switch. Will you explain to whom that signal was directed?

Ans. It was directed to no special party, but the yard master or yard clerk always attended to it to oblige the conductor.

Quest. 20. Did he attend to it in this instance?

Ans. That I can't say, because he was not where I could see.

Quest. 21. Who was the yard clerk at the time the accident occurred?

64 Ans. Al. Merklin.

Quest. 22. Were you ever examined and did you ever testify before as to the circumstances of this accident?

Ans. I was up before the board of inquiry in Philadelphia and just gave them a statement as to how the switches were, &c.

Quest. 23. Were you not also examined as to these matters before Coroner L. G. Sparrow on the day after the accident?

Ans. I believe we were.

Cross-examination waived by Mr. Cross, counsel for the defendant.

And further the deponent saith not.

CHARLES D. CARR.

Sworn and subscribed to.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

And the deposition of John O. Warfield, which is in the words and figures following, to wit:

JOHN O. WARFIELD, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to tell the whole truth, deposes and says as follows:

Quest. 1. What is your residence and on May 22nd, 1887, in what business were you engaged?

Ans. Freedom, Carroll Co., Md. I was an engineer on the B. & O.

65 Quest. 2. Do you remember a collision on May 22nd, 1887, at Bay View Junction?

Ans. I do.

Quest. 3. Please state all the circumstances of the accident, how it happened, what damage was done, who was hurt, &c.

Ans. I was running engine #321, regulating between Bay View and Canton. I followed the 5.10 train from Canton. On reaching Bay View I blew four blasts of the whistle for the switch, which was set by Mr. Merklin. On coming to the switch I noticed that switch #1 was wrong for the track I intended to go on, which I saw too late to stop. I ran into the rear end of the telegraph train on track #1. I did not get off my engine to look at the damage. I do not remember the names of all hurt, but I know that Mr. Martin and Mr. Snowden were hurt.

Quest. 4. How did switch #1 come to be wrong?

Ans. I could not say whether it was left or thrown wrong.

Quest. 5. What switch did you blow for and was it thrown at the time?

Ans. I blew for the main-track switch and it was thrown at the time.

Quest. 6. Was switch #1 left open or thrown wrong before or after you blew the whistle?

Ans. I could not say which.

66 Quest. 7. Who had charge of the switches at that point?

Ans. No one.

Quest. 8. Who did the switching at this point?

Ans. The conductor in charge of the train.

Quest. 9. Then, if I understand you, at a yard where there is no regular switchman the conductor in charge of the train does the switching?

Ans. Yes, sir.

Quest. 10. Did the conductor in charge of your train throw the switch for you on that day, or did he have anything to do with throwing wrong of switch number 1?

Ans. The conductor had nothing to do with the main-track switch, and I do not know anything about switch number 1, whether it was thrown wrong or wrong before.

Quest. 11. At what rate of speed were you going when you collided with this train?

Ans. About three miles an hour.

Quest. 12. What damage, if any, was done to your engine and to the end of the car you struck?

Ans. None done to the engine, and as to the car I can't say, as I did not look.

Quest. 13. I cannot say positively, but I think it was the third and fourth.

[In pencil on margin:] Question omitted to 13 and only answer put in its stead.

Quest. 14. Did you go around and look at the place where the men were hurt?

67 Ans. I did not. I did not get off my engine at all.

Quest. 15. If you know, please tell what breaking it was at the place these men were standing that caused the injury.

Ans. I don't know, because I did not look. I was not near it at all.

Quest. 16. Were you ever examined as a witness before about this accident; and, if so, when and where was it?

Ans. I was examined before Coroner Sparrow, at the southwestern police station, the next day; also by the board of inquiry of the railroad, at Philadelphia.

Cross-examination waived by Mr. Cross, counsel for the defendant.

And further this deponent saith not.

JOHN O. WARFIELD.

Sworn & subscribed to.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

* * * * * * *

And the deposition of Albert Merkland, which is in the words and figures following, to wit:

ALBERT MERKLIN, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to tell the whole truth, deposes and says as follows:

Quest. 1. State your residence and occupation.

Ans. Southeast corner of Bloom & Division streets, of Bal-
68 timore city; am a yard clerk of the Philadelphia division of the Baltimore and Ohio railroad at Bay View.

Quest. 2. Were you engaged in the same business May 22nd, 1887?

Ans. I was.

Quest. 3. How many tracks and switches are there in the yard at Bay View?

Ans. There are seventeen switches and ten tracks, including the main track.

Quest. 4. What roads does it join? You speak of it as a junction.

Ans. It is not a junction. It is Bay View station.

Quest. 5. Was there May 22nd, 1887, any regular switchman at that point?

Ans. No cause for any switchman. It was a regular yard.

Quest. 6. In switching trains in the yard whose duty was it to attend to the switches?

Ans. Train parties.

Quest. 7. Do you remember an accident or collision which occurred there May 22nd, 1887?

Ans. I do.

Quest. 8. Please state the circumstances of the collision, how it occurred, what damage was done, and who was injured.

Ans. The shifting engine # 321 with a pull of freight from
69 Canton arrived at Bay View on or about 5.15 p. m., pulled on down through the switches, number 1 being opened, collided with a train standing on number 1. It was moving at the rate of two or three miles an hour. I do not know who was hurt.

Quest. 9. Where were you when the collision took place—how far from the trains?

Ans. In the yard. The distance I do not know.

Quest. 10. How did switch number 1 come to be open?

Ans. I do not know.

Quest. 11. Whose duty was it to have kept that switch in proper condition?

Ans. There was no particular switchman in the yard, as I have stated. The trainmen attended to the switching.

Quest. 12. Then I infer that the trainmen who used the switch last were the ones who should have put it back in its place. Is this correct?

Ans. If they had used it I do not know who had handled the switch last.

Quest. 13. Is it not the custom that all switches leading on the main track should be kept closed?

Ans. The main-track switch should.

Quest. 14. Was this a main-track switch?

Ans. No.

Quest. 15. What damage was done to the cars that were standing on the siding?

Ans. I do not know.

70 Quest. 16. Were you at the place where the parties were injured shortly after the accident occurred and while the parties were being taken out?

Ans. I was in the office.

Quest. 17. Did you see the wreck at all before it was cleared away or the cars on the side track moved?

Ans. I took no account of it.

Quest. 18. Who cleared away the wreck?

Ans. It was done at night whilst I was away.

Quest. 18½. Who took the men who were hurt out of the wreck?

Ans. I do not know.

Quest. 19. What were the nature of your duties as an employee of the company at that time?

Ans. I was employed as a yard clerk.

Quest. 20. What are the duties of the yard clerk?

Ans. To take account of all the cars that come into the yard.

Quest. 21. Were you ever examined as a witness in reference to this accident; and, if so, when and where?

Ans. I was examined at the coroner's inquest at the southwest police station.

Quest. 22. Were you not suspended from the duties of yard clerk for your connection with this accident?

Question objected to by defendant's counsel.

71 Ans. I do not know.

Cross-examination by defendant's counsel:

X Int. 1. Do you mean that you have been suspended, but do not know what for?

Ans. I do.

And further this deponent saith not.

ALBERT MERKLIN.

Sworn & subscribed to.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

* * * * * * *

And the deposition of C. Richardson, which is in the words and figures following, to wit:

C. Richardson, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to tell the whole truth, deposes and says as follows:

Quest. 1. What was your residence and occupation on May 22nd, 1887?

Ans. I lived on Clinton street, Canton, in Baltimore city, and was a brakeman on the Baltimore and Ohio railroad.

Quest. 2. Do you remember an accident at Bay View May 22nd, 1887?

Ans. I remember the accident to which you refer, but do not remember the date.

Quest. 3. Please state all you know about that accident.

72 Ans. On a Sunday, the day to which you have reference, the conductor asked off for a short while in the afternoon, and the other brakeman and myself went to Canton for a caboose for the telegraph train which was to go out. Being some extra freight in there, we were ordered to take it out with us. The engineer blew for the switches in an accustomed style. The main-track switch, which is the only one which has a signal to it, was given to us right to go in. The other switches neither us nor the engineer could see. The camp train was on number 1 siding and the switch was opened, and we went in and struck the train. Then we got the train back somehow; I do not know how. Then I went back to flag the rear to keep the other engine from running into us.

Quest. 4. For what siding were you all going to and for what switch did you blow?

Ans. I do not recollect whether it was for number 2 or 3.

Quest. 5. Who did the switching for you in going to that siding?

Ans. I could not say.

Quest. 6. Do you know whether switch number 3, to which you were going, was open at the time?

Ans. No, sir; it was supposed to be open when the main-track switch was open.

Quest. 7. Why did you suppose that switch number 3 was opened when the main-track switch was open?

73 Ans. It was supposed that when the main-track switch was open that all the switches were opened all the way through for ever which the signal was blown.

Quest. 8. Who had charge of your train as conductor?

Ans. Frank Bortner, I suppose.

Quest. 9. To what extent were the telegraph camp cars wrecked?

Ans. I could not say.

Quest. 10. Did you see the place where the men were hurt before or shortly after they were taken out?

Ans. Yes, sir; I went down there and caught one man that was in between the cars, laid him down or took him out, and then went right back with the flag to flag the rear end of our train.

Quest. 11. What breakage in the cars caused the injury to these men?

Ans. Timbers, I suppose, giving away. I am hardly prepared to answer it, as I do not know anything about the cars.

Quest. 12. Were these two cars where the men were hurt telescoped or jammed together at the end?

Ans. They were not when I got there.

Quest. 13. Had they been before you got there?

Ans. I am unable to say. I could not see.

Quest. 14. Was the platform of the car where the men were hurt broken off?

Ans. They were broken, but I could not say how much.

74 Quest. 15. Was the platform of any car between that and the engine broken?

Ans. I could not say.

Cross-examination made by defendant's counsel.

And further this deponent saith not.

C. RICHARDSON.

Sworn & subscribed to.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

Adjourned at 1.40 p. m. to meet again at 3 o'clock.

* * * * * * *

And the deposition of Charles W. Mitchell, which is in the words and figures following, to wit:

Met, pursuant to adjournment, at 3 o'clock p. m.

CHARLES W. MITCHELL, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to tell the whole truth, deposes and says as follows:

Quest. 1. State your residence and occupation.

Ans. I reside at 22 South Green street, Baltimore city, and am by occupation a practicing physician.

Quest. 2. On the 22nd day of May, 1887, what connection had you with the Maryland University hospital?

Ans. I was resident physician.

Quest. 3. Do you recall the case of a patient by the name
75 of J. Wilson Martin, who was on that day brought to your hospital?

Ans. I do.

Quest. 4. Will you please describe fully the injuries from which he was suffering at that time?

Ans. He was suffering at that time with a compound fracture of the left thigh and a simple fracture of the right thigh. He was in a condition *a* very great shock, and we thought the outlook for his recovery was very bad. He remained in the hospital under treatment until August 6th, 1887, when he was discharged. At the time of his discharge, although his wounds had healed, he was very lame and totally incapacitated for any bodily work.

Quest. 5. Explain what is meant by the terms compound and simple fracture.

Ans. By the term compound fracture is meant a break of the bone with a wound leading from the surface of the body down to the seat of the break. By simple fracture is meant a mere break of the bone, without any external wound.

Quest. 6. In the case in question what was the nature of the external wound?

Ans. The external wound was caused by the broken fragment of bone protruding through the flesh and skin.

Quest. 7. During the time Mr. Martin was at the hospital what, if any, pain did he suffer?

Ans. He suffered very severe pain, so that it was necessary
76 to keep him under the influence of anodine nearly all the time.

Quest. 8. What, in your judgment as a physician, were the chances of Mr. Martin becoming able to perform bodily labor?

Ans. Bad.

Quest. 9. Is he likely to be seriously prevented for any great length of time from earning a livelihood by physical labor?

Ans. I should think so.

Quest. 10. How long would this disability continue?

Ans. During life.

Quest. 11. Please give your reason for thinking that this disability will continue through life.

Ans. My reason is that in the healing of such fractures there is necessarily a considerable short-ning of the bones, which, being unequal on the two sides, would render the patient permanently a cripple, and after such injuries the patient would be apt to become easily fatigued and suffer considerable pain after any uncommon exertion.

And further this deponent saith not.

C. W. MITCHELL, M. D.

Sworn & subscribed to.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

Adjourned at 5 o'clock p. m. July 2nd to meet at 10 o'clock a. m. July 3rd.

77 Met at 10 o'clock a. m. July 3rd, but, at request of counsel, adjournment was had until 10 o'clock a. m. July 5th, the fourth being a legal holiday.

Met at 10 o'clock a. m. July 5th, when counsel for defendant requested a further extension and an adjournment to meet at 10 o'clock a. m. July 6th.

Met, pursuant to adjournment, at 10 o'clock a. m. July 6th, when counsel for the defendant stated that he would waive all further cross-examinations of witnesses.

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN
vs.
THE BALTIMORE AND OHIO R. R. Co.

STATE OF MARYLAND,
City of Baltimore.

I hereby certify that on the 2nd day of July, A. D. 1889, before me, William H. H. Raleigh, a notary public in and for the city of Baltimore and State of Maryland, at my office, corner of Hopkins Place and German street, in the city of Baltimore and State of Maryland, personally appeared, pursuant to the notice hereto annexed, between the hours of 9 a. m. & 6 p. m., Charles D. Carr, John O. Warfield, Albert Merklin, C. Richardson, and Charles W. Mitchell,

78 witnesses in behalf of the plaintiff, J. Wilson Martin, and D. C. Westenhaver, Esq., appeared as counsel for the plaintiff and W. Irvine Cross, Esq., appeared as counsel for defendant, and the said witnesses, being by me first duly cautioned and sworn to testify the whole truth and being carefully examined, deposed and said as appears by the depositions hereto annexed; and I further certify that the said depositions were then and there reduced to writing by me and were, after they had been reduced to writing, subscribed by the said witnesses; that said testimony was concluded on said day and time for cross-examination allowed the counsel for the defendant by the several adjournments, as stated; that said depositions have been retained by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law; and I further certify that the reason why said deposition was taken was that the said witnesses reside more than one hundred miles from the place where this cause is to be tried;

and I further certify that I am not a counsel or attorney to either of the parties, nor am I interested in the event of the cause; and I further certify that the fee for taking said depositions, $25.00, together with additional costs and expenses, as set forth on the next page, has been paid to me by the plaintiff, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and notarial seal, at the city of Baltimore, in the State of Maryland, this
79 6th day of July, A. D. 1889.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

Statement of costs paid by plaintiffs in this cause as follows:

Serving of summons on C. D. Carr, in Philadelphia, Pa.			$3 00
" " J. O. Warfield, in Carroll Co., Md.			3 00
Witness fees paid " " per diem	$1 50		
Mileage	3 15		
			$4 65
" " C. D. Carr, per diem	$1 50		
Mileage	9 40		
			10 90
Paid for four summons on the following witnesses			2 40
Witness fees paid Albert Merklin, per diem			1 50
" " C. Richardson, "			1 50
" " C. W. Mitchell, "			1 50
Costs of taking deposition			25 00
			$53 45

I hereby certify that the above costs were paid by plaintiff in the case.

[Seal William H. H. Raleigh, Notary Public, Baltimore, Md.]

W. H. H. RALEIGH,
Notary Public.

* * * * * * *

And the deposition of George Trader, which is in the words and figures following, to wit:

Notice to Take Depositions.

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

80 To said defendant:

Take notice that, because they live more than one hundred miles from the place of trial and also are about to depart from the district to a distance of more than one hundred miles outside before the time of trial, the depositions of J. S. Turner and Geo. Trader will be taken at the office of the clerk of the county court of Morgan Co., in the town of Berkeley Springs and in the county of Morgan and State of West Va., on the 12th day of July, 1889, between the hours of 9 a. m. and 6 p. m., to be read in evidence on the hearing of the above cause in behalf — the said J. Wilson Martin, pl'tiff.

If from any cause the taking of the same shall not be commenced or, being commenced, shall not be completed on that day, the taking of the same will be adjourned from time to time until they are completed.

Yours, &c., J. WILSON MARTIN,
Per Counsel.

(Endorsed.)

MARTINSBURG, W. VA., *July 10th*, 1889.

This day personally appeared before me, a notary public for the State of West Virginia, John W. Martin, who, being first duly sworn, made oath that he served the within notice by delivering a true copy thereof to John T. Martin at Martinsburg, W. Va., he then being a station agent of the Baltimore & Ohio Railroad Company and in the actual employment of said company, and also by
81 delivering a true copy to E. Boyd Faulkner, he then being the attorney of record of said company.

Given under my hand and official seal this 10th day of July, 1889.

[Seal L. De Witt Gerhardt, Notary Public, Berkeley Co., W. Va.]

L. DE WITT GERHARDT,
Notary Public.

UNITED STATES OF AMERICA,
District of West Virginia, County of Morgan, } *To wit:*

J. WILSON MARTIN
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } At Law.

The deposition of George Trader, taken this 12th day of July, 1889, before me, a notary public for the State of West Virginia, pursuant to the notice hereto annexed, to be read in behalf of the plaintiff in the above-entitled cause, now depending in the circuit court of the United States, at Martinsburg, for the district of West Virginia.

Present: D. C. Westenhaver, for the plaintiff, and M. T. Ingles, for the defendant.

GEORGE TRADER, a witness for the plaintiff, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and being carefully examined, *the said George Trader* did thereupon depose as follows:

82 1st question. Please state your age, residence, and occupation.

The defendant excepts to the deposition of this witness.

Answer. I will be forty-nine years old the 22nd day of August, 1889; residence, Parkersburg, West Virginia; occupation, carpenter.

2nd question. About the month of May, 1887, — what business were you engaged?

Answer. I think was in the telegraph business.

3rd question. Do you recall an accident or collision which occurred at Bay View Junction, near Baltimore, on Sunday, May the 22nd, 1887, in which John Wilson Martin and some others were injured?

Answer. Yes, sir.

4th question. Please state all you may recall about said accident; how it came to happen, what damage was done, &c.

Answer. As near as I can tell you, the undertaker or the dispatcher was attending the switches and him or somebody else threw number one switch instead of number two switch and an engine and thirteen coal hoppers and a caboose, as near as I can recollect, on number one track, in the rear of the camp train, ran into the camp train and mashed off of it two bumpers—that is, the two bumpers, one on the car we slept in and the other on the dining or cooking car.

83 5th question. Where was Mr. Martin and the other men who were hurt at the time of the collision?

Answer. They were between the two cars—sleeping and dining cars.

6th question. Do you mean when you say between the cars, on the ground or on the cars?

Answer. Mr. Martin was sitting on the brake on top of platform with his feet hanging down between the two guard-rails.

7th question. Where were you at the time and how long was it after the collision before you saw Mr. Martin?

Answer. I was filling a lamp at a side door between eight and ten feet from where Martin was sitting when I felt the shock. I left the top of the lamp fall out down on the ground, and the scissors. I jumped out at once and ran about ten or twelve feet, and I seen Martin and others fast between the coaches and were screaming. I ran up to the engineer and told him not to shove the car any more; that he had a lot of men fastened between the coaches. I ran back and they had pulled the coaches apart.

8th question. Of what did the train in which the two cars were that you have been talking of consist?

Answer. A material car, a sleeping car, and a dining car.

8th question. How many and what cars were between the
84 place where these men were hurt and the end which was struck by the engine?

Answer. Could not tell exactly how many there were, but between five or six.

9th question. Was there an engine attached to your train at the time?

Answer. No, sir.

10th question. Was your train in motion, or what was it doing?

Answer. It was lying on this dead track, as I took it to be.

11th question. What damage, if any, was done to these five or six cars between the eating and sleeping cars and the end struck by the engine?

Answer. Zepp had a caboose for a cook-car, I think; it broke the bumper off of the caboose and broke one of the bumpers off of one of the coach.

12th question. Was this bumper either on the coach or caboose as badly damaged as that on the cooking or sleeping car?

Question excepted to.

Answer. No, sir; they were not; broke down; just broke in the middle.

13th question. Had a person been standing on the platform of either of these cars would he have been injured as those were on the other cars?

Question excepted to.

Answer. No, sir; I don't think he would.

14th question. State if you know at what rate of speed the
85 engine was going that struck your train.

Answer. I do not know.

15th question. How great was the shock on your train where you were?

Answer. Not very much of a shock. I was stooping down filling a lamp and it did not throw me over.

16th question. In what way were those bumpers on the eating and sleeping car broken?

Answer. They were mashed right down between on the rail.

17th question. What became of the platforms between the two cars? Do you include them with the bumpers?

Answer. One of them was standing up on the edge and the one on the sleeping car was smashed up.

18th question. To what was this breaking or smashing up — to? In other words, describe the condition of the broken timbers.

Question excepted to.

Answer. On the sleeping car the timber was bad and rotten; on dining car the timber was partly good.

19th question. What timbers in the sleeping car were rotten?

Answer. The timber that holds the platform up.

86 20th question. You say the timbers of the dining car were partly good. What were good and what, if any, were bad?

Answer. There were about two pieces bad.

22nd question. What pieces were they and in what way were they bad?

Ans. They were the pieces that held the platform up and were doted—that is, between rotten and not rotten.

23rd question. State had these timbers been in good condition or sound if the force of the collision would have been sufficient to have broken or damaged them.

Question excepted to.

Answer. From the other cars I don't think it would have damaged the men. It may have hurt some of them.

24th question. How long had you been with this camp before this accident?

Answer. I commenced on the 8th day of August, 1884, and was with them all the time till the accident occurred.

25th question. How long had this dining and sleeping car been with the camp?

Answer. I think the sleeping car came to us at Wheeling about the second year after I commenced. The dining car, I think, was with us all the time from the time I commenced.

26th question. State if you know when last before the acci-

87 dent these cars had last undergone general repairs.

Question excepted to.

Answer. They were repaired some at Grafton, Piedmont, Keyser, Wheeling, Glenwood, and everywhere, but never any general repairs, to my knowledge.

27th question. State if these two cars had been inspected to ascertain their condition at any time before the accident; and, if so, when last.

Answer. I don't know that they were nor couldn't say that they wasen't.

28th question. What knowledge, if any, had you of the unsafe condition of these cars prior to the accident?

Question excepted to.

Answer. The car repair-s at Grafton said they were not worth repairing.

29th question. How long before the accident was this?

Answer. Between eight and four months; maybe a year.

30th question. What, if any, external indications were there of this unsoundness or rotten condition of the timbers of the sleeping car?

Question excepted to.

Answer. I never examined it.

31st question. In what work were you and Mr. Martin engaged prior to this accident?

Answer. Telegraph repair.

88 32nd question. Were you on duty when the accident occurred?

Answer. No, sir.

33rd question. When and where had you last been at work before the accident?

Answer. I think it was between Piedmont and Keyser, at a place called Red Rock. I think were working there when ordered to Chester, Pa.

34th question. How did you travel from there to Bay View and by what line of road?

Answer. On No. 4 from Parkersburgh to Baltimore; balance on street car and walked.

35th question. How far is Parkersburg from Martinsburg?

Answer. Something near two hundred and seventy-five miles, I suppose.

Cross-examination:

Without waiving exceptions the defendant, by its attorney, asks the following questions by way of cross-examination:

1st question. When the bumpers of the two cars in Zepp's train or camp were broken how close together were these two cars forced by the collision?

Answer. About two or three feet; the caboose being light, it raised up.

2nd question. How near together could these cars come without breaking their bumpers or any part of them?

89 Answer. I think about four feet or four and a half feet.

3rd question. How close together could the platforms or iron guards around the platforms come without breaking anything?

Answer. I think it is something near a foot between them.

4th question. When the bumpers were broken on that occasion

how near together did their platforms or iron railing around their platforms come?

Answer. Where the bumpers are not more than six or eight inches.

5th question. Did not the platforms of those two cars come together in that collision and the platform of one of them slide over the platform of the other some short distance?

Answer. Yes.

6th question. If at that time Mr. Martin had been on one of those two cars, sitting on the handle of the brake or iron railing around the platform, with his legs down between the cars, as you have described him to have been on the other car a moment before the accident, would he not have been liable to have been hurt?

Answer. He might have been hurt and he might not have been hurt.

7th question. Would not his legs inevitably have been caught between the platform of one car and the iron railing around
90 the other platform or between the iron railings of the two platforms? Would there have been any possibility of escape?

Answer. I don't know whether the caboose had any guard. If he had been sitting on the passenger coach and the brake had been on that end next to the caboose I don't think he would have been badly injured, if hurt at all; the platform would not have caught him at all where he was sitting.

Redirect examination:

1st question. Please describe the positions of the other men on the sleeping and dining car platforms who were hurt.

Question objected to.

Answer. Snowed Clemmans was standing on the second step from the ground on the dining car, opposite each side of the hull of the car. He was killed. Oliver Buckalew was sitting on the platform of the dining car about two minutes before the collision. He was mashed through the hips and back, breast, and head. James E. Hare was standing on the dining-car platform about two minutes before the collision. Both of his ankles were crushed.

And further this deponent saith not.

G. A. TRADER.

UNITED STATES OF AMERICA,
District of West Virginia, State of West Virginia and County of Morgan, } *To wit:*

91 I, T. H. B. Dawson, a notary public duly qualified for the county of Morgan and State of West Virginia, in said district, do hereby certify that the reason for taking the foregoing deposition and the fact is that the witness, George Trader or G. A. Trader (both being the same person), lives more than one hundred miles from Martinsburg, the place of trial of the above-entitled cause. I further

certify that on the 12th day of July, 1889, I was attended by the said witness, who, being of sound mind and of lawful age, was by me first carefully examined and cautioned and sworn to testify the whole truth, and that his deposition was by me reduced to writing and in the presence of the witness, and after carefully reading the same to the witness he subscribed the same in my presence. I have retained the said deposition in my possession and now send it, under seal, to the United States circuit court for the district of West Virginia held at Martinsburg, in which the above-entitled cause is depending; and I do further certify that I am not of counsel or attorney for either of the parties in deposition and caption named nor in any way interested in the event of the cause named in said caption.

Seal T. H. B. Dawson, Notary Public, Morgan County, W. Va.

In testimony whereof I have hereunto set my hand and official seal this 12th day of July, A. D. 1889, and in the 113 year of the Independence of the United States of America.

92 T. H. B. DAWSON,
Notary Public.

Witness:

Geo. Trader, one day's attendance	$1 50	
Mileage, 32 miles	1 60	
		$3 10
Sheriff, 2 sum's		1 60
Notary		7 40
		$11 50

He also introduced in his behalf Jacob A. Keiter, a witness, who testified to the jury that in July, 1887, he was employed as a lineman in the telegraph department of the B. & O. Railway Company; that he belonged to the same camp with the plaintiff, which camp was under the direction of J. S. Turner; that in May, 1887, they were at work near Piedmont, in West Virginia, and were ordered from there to Chester, Pa.; that on Saturday, the 21st day of May, 1887, the three cars which composed their camp (one of which was used for a material car, one for a sleeping car, and the other for a cooking and dining car) were attached to a freight train and taken to Bay View Junction, near Baltimore, where it and another camp of telegraph lineman under charge of Mr. Zepp were placed on a switch or side track to wait conveyance to Chester; that the material car was in front, the sleeping car next, and the cooking and dining car next, and then came the cars of Zepp's camp;
93 that witness was in the end of the sleeping car next to the cooking and dining car when the collision occurred; that he tried to go out by the rear door of the car, but the two cars were jammed together and he could not get out there. He went out by

the front end of the car and went around to the rear end, where he saw the plaintiff jammed in between the two cars, with his hand on the knob of the door of the cooking car, and the platforms of the two cars were mashed down. Several others were hurt, and he ran back and told the engineer of the colliding engine not to push, that several were hurt, and then returned to the people who were hurt; that the men in the cooking and sleeping cars were not hurt; nobody was hurt except the plaintiff and the others who were standing on the platform between the cooking and sleeping cars. The next day we went into Chester in the cars of Zepp's camp and left the cars of our camp at Bay View. Plaintiff came to the camp about noon of the day of the collision, which was Sunday, the 22nd day of May, 1887. The platforms of the two cars seemed to be right badly rotten. Zepp's camp was between our camp and where the engine struck.

And the plaintiff also, who testified to the jury as follows:

My age is twenty-one years; I arrived at that age on the 2nd day of December, 1888. In May, 1887, I was in the employ of the telegraph department of the Baltimore and Ohio Railroad
94 Company, under Foreman J. S. Turner. When we were on our way to Chester I stopped off at my home at Martinsburg, but took another train and arrived at the camp about noon of the 22nd day of May, 1887. I was sitting on the brake wheel when I heard the whistle for the switch, and some one said, "There comes the train that is to take us to Chester," and I got down from the brake wheel and looked out and saw the moving train which was not off the main switch yet, and I turned and was just going into the cooking car from the platform when the collision occurred and I was caught and hurt.

And the defendant, to maintain the issues upon its part, read in evidence to the jury the written application and release of November 19th, 1886, of the plaintiff to be admitted a member of the Baltimore and Ohio Employees' Relief Association, which was signed by the plaintiff and his father, which is in the words and figures following, to wit:

J. S. Turner, foreman of camp.

Baltimore & Ohio Employees' Relief Association.

Application for and Contract of Membership.

To the secretary of the Baltimore & Ohio Employés Relief Association:

I, John W. Martin Jr., of Martinsburg, in the county of Berkeley, State of West Virginia, at present employed as a ground hand in the telegraph department, M. S. division, of the Baltimore & Ohio Railroad Company, apply to be admitted a member of the
95 Baltimore & Ohio Employés' Relief Association, hereby agreeing to conform to, and be bound by, the constitution and

by-laws, rules and regulations of said association, now in force or recognized by said association, and also to conform to, and be bound by, such additional by-laws, rules, regulations and amendments of the constitution as may hereafter be adopted by its committee of management.

I also agree, that the said railroad company, by its proper agents, shall deduct monthly, in advance, from the wages that are now, or may hereafter, become, due to me the sum of $1.50 per month, which deductions I hereby authorize and direct said railroad company to make, and shall pay or credit the same to the said relief association, in order to secure to myself, or in case of my death to my father John W. Martin, Martinsburg, W. Va., or whomever I may hereafter designate in writing, with the written consent of the secretary of said association; or, if there shall then be no such person, to my next of kin (under the laws of the State of Maryland governing the distribution of the personal estate of persons dying intestate), two times the benefits secured by said by-laws, rules and regulations to the lowest class of contributors to the relief fund of said association; subject as to the payment thereof to all the provisions and requirements of said constitution, by-laws, rules and regulations.

96 I further agree, that this application, when approved by the secretary of the said association, shall constitute a contract between myself and the said Baltimore & Ohio Railroad Company as a condition of my employment by the said company, and, as such, be an irrevocable power and authority to said company to make the deductions and payments aforesaid; and, that when so approved, this application shall likewise constitute an assignment, in advance, to the said Baltimore & Ohio Employés' Relief Association of such portion of my wages, which shall have precedence over any other assignment by me of my wages, or of any claim upon them, on account of liabilities incurred by me.

I hereby further agree, that in consideration of the contribution of the Baltimore & Ohio Railroad Company to said association, and of the guarantee by the said railroad company of the payment of the benefits aforesaid, the said railroad company shall not be liable to any claim or suit by reason of any accident happening to me while employed in any manner in the service of said company, whether said accident be caused by the negligence of said company, its officers or agents, or otherwise, except as guarantor of the benefits payable to me or my beneficiary, under the terms of this application and agreement; nevertheless, said association may require, as a condition precedent to the payment of such benefits, that all

97 acts deemed appropriate or necessary by the secretary of said association to effectuate the release and discharge of said company, be done by those who might bring suit for damages by reason of such injuries or death.

I understand and agree, that this application, when the acceptance hereof shall be endorsed hereon by the secretary of said association, shall constitute the contract between me and said association and said Baltimore & Ohio Railroad Company, by which my rights as

a member of said association, and as an employé of said railroad company, shall be determined as to all matters within its scope; that each of the statements herein contained, and each of my answers to the questions asked by the medical examiner and hereto annexed, shall constitute a warranty by me, the truth whereof shall be a condition of the payment of any of the benefits aforesaid; that my suspension or discharge from the service of said company shall prevent the payment of any benefits for sickness or disability arising during the period of suspension, or subsequent to the date of my discharge; but I may, nevertheless, continue from month to month my right to receive the benefits payable in case of natural death, by paying the monthly dues required therefor.

I hereby certify that I am 19 years of age, am correct and temperate in my habits, and have no injury or disease, constitutional or otherwise, which will tend to shorten my life; am now in good health and am able to earn a livelihood.

98 In witness whereof I have signed these presents at Martinsburg, in the State of West Virginia, this 19 day of November, 1886.

(Signed) JOHN WILSON MARTIN, JR.

Witness:
(Should be an official of Co.)
(Signed) JNO. A. ROBB, JR., *Med. Ex'r.*
(Signed) T. CANNON, *Ch'f L.*

Questions to be Asked the Applicant by the Medical Examiner.

Were you ever before employed by the Baltimore & Ohio Railroad Company; and, if so, in what capacity and in what department and division? No.

Have you ever been rejected for life insurance by any life insurance company or beneficial asssociation; if so, why, when, and where? No.

Have you now, to the best of your knowledge and belief, any disorder or private disease or any infirmity or weakness tending to impair yourconstitution? No.

Have you been vaccinated? Yes. Is there a vaccine mark upon you? Yes.

Are you married? If so, give name of wife and names and ages of children, stating which, if any of, them, are married, giving their married names. If not married and parents are living give their names and addresses. Single; mother dead.

99 I hereby consent to my son, John W. Martin, Jr., signing the above contract.

(Signed) J. W. MARTIN, *Father.*

Witness:
(Signed) T. B. CANNON.

(Endorsed.)

R. A. form 1. 20,000, 1, 20, '88.

Baltimore and Ohio Employés Relief Association.

Application and Contract.

Contract No. —.
Name: J. W. Martin, Jr.
Department —.
Company —.

(*Release.*)

5,000, 6, 19, '84. Form 1322.

Whereas, the Baltimore and Ohio Railroad Company has agreed to take into its service John Wilson Martin a minor subject to discharge at the pleasure of the company; and has agreed with our consent to pay him the compensation to be earned for his services, and has been authorized to take from him such receipts and acquittances as the said company may require.

And whereas, the said John Wilson Martin by reason of such employment, will be subjected to great risk of personal injury from neglect of other employees, agents and officers of the said company, and from defects of machinery, and from other
100 causes.

And whereas, in the event of injuries to the said John Wilson Martin whether resulting fatally or otherwise, the said John Wilson Martin or members of his family might make claims for damages against said company.

Now, in order to release the said company from all claims or liability for damages, for injuries of any and all kinds, from any cause whatsoever John Wendel Martin the father and Susan V. Martin the mother, in their several and individual capacities, and acting as guardian for the said John Wilson Martin and the said John Wilson Martin himself, in consideration of the employment by the said railroad company of the said John Wilson Martin, in the service of the said company, and in consideration of the sum of one dollar now in hand paid by the said company, do hereby release and forever discharge the Baltimore and Ohio Railroad Company from all claims for damages and do also further agree to release the said company from all claims and liability for damages arising out of any injury or injuries to the said John Wilson Martin resulting from the character of his employment, from the negligence of other employees, or agents or officers of the said company, from the defects of machinery or any other cause or causes whatsoever,
101 whilst a minor and whilst in the service of said company in any capacity whatsoever.

Witness our hands and seals this 19th day of November, 1886.

JOHN WENDLE MARTIN. [SEAL.]
SUSAN V. MARTIN. [SEAL.]
JNO. WILSON MARTIN. [SEAL.]

Witnesses:
G. W. SANTMAN.
T. B. CANNON.
J. S. TURNER.

{Seal Baltimore & Ohio Employees' Relief Association, Established 1880. Inasmuch as ye have done it unto one of the least of these ye have done it unto me.}

I, S. R. Barr, secretary of the Baltimore & Ohio Employés Relief Association, do hereby certify that the above is a true & literal exemplification of the original filed in this office.

S. R. BARR, *Secretary.*

And nine several receipts and releases in writing signed by the plaintiff, which receipts and releases are in the words and figures following, to wit:

(1.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

Received this day from the Baltimore & Ohio Employés Relief Association, by the hands of T. Cannon, ch'f line'n Camden Sta., the sum of eighty-seven dollars ($87), the same being full allowance which, as a member of said association, I am entitled to receive from its funds for the period commencing May 23 and ending Aug. 31, 1887, by reason of injuries received whilst in the discharge of
102 duty in the service of the B. & O. Railroad Company, and in consideration of the receipt by me of said sum of $87 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare, on honor, that during the period above stated I have not been able, by reason of said injuries, to perform my accustomed labor, and have not done work of any kind for pay.

(Signed) JOHN W. MARTIN, [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
JOHN T. MARTIN, *Ag't.*

M'b'g, 9, 22, '87.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(2.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of T. Cannon, ch'f line'n, Camden Sta., the sum of twenty-six dollars ($26), the same being full allowance which, as a member of said association, I am entitled to receive from its funds for the period commencing Sept. 1 and ending
103 Sept. 30, 1887, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company; and, in consideration of the receipt by me of said sum of $26, I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare, on honor, that during the period above stated I have not been able, by reason of said injuries, to perform my accustomed labor, and have not done work of any kind for pay.

(Signed) J. WILSON MARTIN, [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
JOHN T. MARTIN, *Ag't.*

M'b'g, 12. 1, '87.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(3.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of T. Cannon, ch'f line'n, Camden Sta., the sum of twenty-six dollars ($26), the same being full allow-
104 ance which, as a member of said association, I am entitled to receive from its funds for the period commencing Oct. 1 and ending Oct. 31, 1887, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company; and, in consideration of the receipt by me of said sum of $26, I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I

now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare on honor that during the period above stated I have not been able by reason of said injuries to perform my accustomed labor and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
JOHN T. MARTIN, *Ag't.*

M'b'g, 12, 24, '87.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(4.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

105 Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of T. Cannon, ch'f line'n, Camden Sta., the sum of twenty-two $\frac{50}{100}$ dollars ($22.50), the same being full allowance which as a member of said association I am entitled to receive from its funds for the period commencing Nov. 1 and ending Nov. 30, 1887, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company, and in consideration of the receipt by me of said sum of $22.50 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare on honor that during the period above stated I have not been able by reason of said injuries to perform my accustomed labor and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
JNO. T. MARTIN, *Ag't.*

M'b'g, 12, 24, '87.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

106 (5.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

——, 188–.

Received this day from the Baltimore & Ohio Employés Relief Association, by the hands of T. Cannon, C. L. Camden Sta., the sum of thirteen $\frac{50}{100}$ dollars ($13.50), the same being full allowance which as a member of said association I am entitled to receive from its funds for the period commencing Dec. 1 and ending Dec. 31, 1887, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company, and in consideration of the receipt by me of said sum of $13.50 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare on honor that during the period above stated I have not been able by reason of said injuries to perform my accustomed labor and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: Martinsburg.

Witnesses:
J. B. CANNON.

Jan'y 21, 1888.

107 The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(6.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

——, 188–.

Received this day from the Baltimore & Ohio Employés Relief Association, by the hands of J. S. Turner, foreman, Cumberland, the sum of thirteen dollars ($13.00), the same being full allowance which as a member of said association I am entitled to receive from its funds for the period commencing January 1 and ending January 31, 1888, by reason of injuries received whilst in the discharge of duty in the service of the Balto. & Ohio Railroad Company, and in consideration of the receipt by me of said sum of $13.00 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare on honor that during the period above stated I have not been able by reason of said injuries to perform my accustomed labor and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

108 Residence: ——.

Witnesses:
J. T. MARTIN, *Ag't.*

M'b'g, 2, 21, '88.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(7.) *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of agent — Martinsburg, the sum of twelve & $\frac{50}{100}$ dollars ($12.50), the same being full allowance which, as a member of said association, I am entitled to receive from its funds for the period commencing Feb'y 1 and ending Feb'y 29, 1888, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company, and in consideration of the receipt by me of said sum of $12.50 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare on honor that during the period above stated I have not been able, by reason of said injuries, to perform my accus-
109 tomed labor and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
J. T. MARTIN, *Ag't.*

M'b'g, 3, 25, '88.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(8.) R. A. form 12. 5,000, 6, 26, '88.

$\frac{80430}{60992}$. *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of agent — Martinsburg, the sum of thirteen .50 dollars ($13.50), the same being full allowance which, as a member of said association, I am entitled to receive from its funds for the period commencing May 1 and ending May 31, 1888, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company, and in consideration of the receipt by me of said sum of $13.50 I do hereby release and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may
110 or can hereafter have, against either of the aforesaid companies by reason of said injuries.

I declare, on honor, that during the period above stated I have not been able, by reason of said injuries, to perform my accustomed labor, and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
J. T. MARTIN, *Ag't.*

M'b'g, 7, 11, '88.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

(9.) R. A. form 12. 5,000, 6, 26, '88.

$\frac{79226}{60992}$. *Receipt for Disablement Allowance.*

(Attach this paper to the accident claim, of which it forms a part.)

—— —, 188–.

Received this day from the Baltimore & Ohio Employés' Relief Association, by the hands of agent — Martinsburg, the sum of twenty-six dollars ($26.00), the same being full allowance which, as a member of said association, I am entitled to receive from its funds for the period commencing March 1 and ending April 30, 1888, by reason of injuries received whilst in the discharge of duty in the service of the B. & O. Railroad Company, and in consideration

of the receipt by me of said sum of $26 I do hereby re-
111 lease and forever discharge the said company and all other companies operating its roads, branches, or divisions from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have against either of the aforesaid companies by reason of said injuries.

I declare, on honor, that during the period above stated I have not been able, by reason of said injuries, to perform my accustomed labor, and have not done work of any kind for pay.

(Signed) J. W. MARTIN, JR., [SEAL.]
Member of Association.

Residence: ——.

Witnesses:
J. T. MARTIN, *Ag't.*

M'b'g, 5, 22, '88.

The party paying the allowance will send this receipt to the secretary of the association as a voucher for its payment.

And this being all the evidence in the case, the court gave to the jury the following instructions, to wit:

(First.) If the jury find from the evidence that plaintiff was an employee of the railroad company, defendant, on the 22d day of May, 1887, and at the time of his injury was standing on the platform of a car in which he was housed as such employee, and that by reason of some negligence on the part of other employees of the railroad company a train ran into the camp car on which
112 the complainant was so housed and transported, and that he himself was not in the car, but on the platform between the cook and sleeping car, sitting on the brake wheel, the jury are instructed that such position occupied by the plaintiff was not a proper position for him to occupy, and that if they believe the evidence of the plaintiff in this respect he is not entitled to recover, because he contributed to the injury by his own negligence by being on the platform instead of in the car, where he ought to have been.

Second. And if the jury find from the evidence that prior to his employment by the defendant the plaintiff signed the contract and receipts offered in evidence by the defendant and received the benefits arising therefrom both before the bringing of this suit and afterwards, by which he released the defendant from all default of the defendant's employees and injuries arising to him therefrom, then the defendant is not liable in this action and the verdict must be for the defendant.

To the giving of which instructions and each of them the plaintiff, by his attorneys, objected; but the court overruled said objections and gave said instructions to the jury; to which action of the court in overruling said objections and in giving said instructions

and each of them to the jury the plaintiff, by his attorneys,
113 objected and tendered this his third bill of exceptions, and prays that the same may be signed, sealed, and enrolled, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

(*Bill of Exceptions No.* 4.)

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that during the trial of this cause the testimony was as set forth in plaintiff's third bill of exceptions, which is hereby referred to and made a part of this bill; and when the court had given the two instructions to the jury set forth in that bill of exceptions the court instructed the jury to find the verdict, which is in the words following, to wit:

"We, the jury, on the issues joined, find for the defendant under the instructions of the court."

To the giving of which last-mentioned instruction to the jury the plaintiff, by his attorneys, objected; but the court overruled said objection and gave said instructions to the jury; to which action of the court in overruling said objection and giving said instructions to the jury the plaintiff, by his attorneys, excepted, and tenders this his fourth bill of exceptions and prays that the same may
114 be signed, sealed, and enrolled, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

(*Bill of Exceptions No.* 5.)

In the Circuit Court of the United States for the District of West Virginia.

J. WILSON MARTIN
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that during the trial of this cause the plaintiff, by his attorney, moved the court to set aside the verdict and grant him a new trial; which motion the court overruled; to which action of the court in overruling said motion and refusing to grant said new trial the plaintiff, by his attorneys, excepts and tenders this fifth bill of exceptions, and prays that the same may be signed, sealed, and enrolled, which is accordingly done.

HUGH L. BOND, *C't Court.* [SEAL.]

UNITED STATES OF AMERICA, } ss:
District of West Virginia, }

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, in the fourth circuit, do hereby certify that the writings annexed to this certificate are true
115 copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Martinsburg, in the district of West Virginia, this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

{ Seal Circuit Court United States, District West Virginia, Martinsburg, West Va. }

L. B. DELLICKER,
Clerk Circuit Court United States, District of West Virginia.

Fee, $35.00, paid by J. Wilson Martin.

116 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between J. Wilson Martin, plaintiff, and the Baltimore & Ohio Railroad Company, *is* defendant, a manifest error hath happened, to the great damage of the said J. Wilson Martin, as by said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

L. B. DELLICKER,
Clerk of the Circuit Court of the United States,
District of West Virginia.

Allowed by—
J. J. JACKSON,
U. S. Dist. Judge.

117 This writ of error was produced by the J. Wilson Martin named therein and deposited in the circuit court therein mentioned on the 31st day of December, in the year of our Lord eighteen hundred and eighty-nine, and the said writ was served by a copy thereof being lodged for the Baltimore and Ohio Railroad Company, the adverse party, in the clerk's office of the said court, where the records of the case therein mentioned remain.

L. B. DELLICKER,
Clerk Circuit Court United States, District of West Virginia.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, at Martinsburg, wherein J. Wilson Martin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

119 Due and legal service of the within citation and of the writ of error on which it is issued is hereby acknowledged and any other or further service of this writ & citation waived this 31st day of December, 1889.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By JNO. A. HUTCHINSON, *Its Attorney of Record.*

The within is the original citation on the writ of error in the within case.

L. B. DELLICKER,
Clerk C. C. U. S., Dist. W. Va.

120 In the Circuit Court of the United States for the District of West Virginia, at Martinsburg.

J. WILSON MARTIN, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. } At Law.

Know all men by these presents that we, J. Wilson Martin and John W. Martin, are held and firmly bound unto The Baltimore and Ohio Railroad Company in the sum of five hundred dollars, to be paid to the said Baltimore and Ohio Railroad Company or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the said J. Wilson Martin hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of West Virginia, sitting at Martinsburg on the 19th day of October, A. D. 1889:

Now, the condition of this bond is such that if the said J. Wilson Martin shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof we have hereunto set our hands and seals.

121 (Signed) J. WILSON MARTIN. [SEAL.]
(Signed) JOHN W. MARTIN. [SEAL.]

Bond approved.
J. J. JACKSON,
U. S. Dist. Judge.

UNITED STATES OF AMERICA, } *To wit:*
District of West Virginia, }

John W. Martin, being duly sworn, deposes and says that he is worth six thousand dollars ($6,000.00) over and above all just debts and liabilities and exemptions.

(Signed) JOHN W. MARTIN.

Sworn to this 25th day of November, 1889, before me—
(Signed) L. B. DELLICKER,
Clerk U. S. Circuit Court, Dist. W. Va.

A true copy.
Teste:
L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

122 [Endorsed:] J. Wilson Martin *vs.* The Baltimore and Ohio Railroad Company. Copy of bond.

123 J. WILSON MARTIN, Plaintiff in Error,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant in Error.

Writ of Error from the Circuit Court of the United States for the District of West Virginia to the Supreme Court of the United States.

And now comes J. Wilson Martin, the plaintiff in error in the said cause, by his attorneys, Flick & Westenhaver, and having obtained and filed his writ of error therein, returnable to the October term, 1890, of the Supreme Court of the United States, assigns the following errors in the judgment and rulings of the circuit court of the United States for the district of West Virginia, sitting at Martinsburg:

1. The circuit court erred in sustaining the demurrer of the said defendant in error to the plaintiff's plea in abatement No. 1, and in overruling the motion of the plaintiff in error to remand the said cause to the State court whence it had been removed to said circuit court of the United States, thus deciding, both in sustaining said demurrer and in overruling said motion, that the Baltimore and Ohio Railroad Company was a non-resident of West Virginia and entitled to remove.

2. The circuit court also erred in permitting to be filed the special plea of release tendered by the defendant in error, and also in overruling the demurrer of the plaintiff in error to said special plea of release.

3. The circuit court erred in sustaining the demurrer of the defendant in error to the special replication of infancy filed by the plaintiff in error to said special plea of release.

4. The circuit court also erred in giving to the jury against the objection of the plaintiff in error the instructions numbered
124 first and second set forth in the third bill of exceptions, and the instructions set forth in the fourth bill of exceptions.

5. The said circuit court also erred in rendering the judgment that the plaintiff in error take nothing by his suit, etc., etc.

And the plaintiff in error therefore prays that the judgment of the circuit — may be reversed.

FLICK & WESTENHAVER,
Attorneys for Plaintiff in Error.

Endorsed on cover: Case No. 13,949. West Virginia C. C. U. S. No. 391. J. Wilson Martin, plaintiff in error, *vs.* The Baltimore & Ohio Railroad Company. Filed January 13, 1890.

Office Supreme Court U. S.
FILED.
NOV 3 1893
JAMES H. McKENNEY,
CLERK.

67

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 13,949.

J. WILSON MARTIN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

Motion to Dismiss, and Brief on the Part of the Defendant In Error.

JOHN K. COWEN,

Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 13,949.

J. WILSON MARTIN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

Motion to Dismiss, and Brief on the Part of the Defendant In Error.

To the Honorable the Judges of the Supreme Court of the United States:

The defendant in error respectfully moves the Court to dismiss the writ of error in this case, because this action has abated by the death of the plaintiff in error.

BRIEF.

This is an action brought by the plaintiff in error in the Circuit Court of Berkeley County, West Virginia, to recover damages for personal injuries alleged to have been caused the plaintiff in error by the negligence of the defendant in error.

On April 12, 1888, the defendant filed its petition for removal, and the cause was removed to the Circuit Court of the United States for the District of West Virginia.

Trial was had in that Court, and the verdict and judgment being for the defendant, the plaintiff brought his case to this Court on writ of error.

Since the case has been pending in this Court, J. Wilson Martin, the plaintiff in error, has died, and on October 30th, 1893, L. C. Gerling, his administrator, upon the suggestion of the death of the plaintiff in error, was voluntarily admitted and made the party plaintiff, and the suit sought to be revived in his name. The defendant in error now moves to dismiss the writ of error, because an action for personal injuries in the State of West Virginia abates on the death of the plaintiff.

Whether such actions do or do not survive, depending, as is said in Schreiber vs. Sharpless, 110 U. S. 76, "on the substance of the cause of action, not on the forms of proceeding to enforce it," is a question of State law.

Henshaw vs. Miller, 17 How. 212.

The Code of West Virginia, chapter 127, sections 1 and 2, provides:

"1. Where a party dies or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee, cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

"2. Where such fact occurs in any stage of a cause, whether it be in a Court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

Section 3 provides for death pending appeal, &c., and section 4 provides the method of bringing into Court the

persons who are entitled to revive any cause. All of the chapter is printed as an appendix to this brief. From an inspection of the whole chapter, it will at once appear that it is a procedure Act, providing the formal steps necessary to meet the several contingencies of death, conviction of felony, insanity, &c.

Section 1 provides for entering judgment, if these facts occur after verdict; the first clause of section 2 provides that in case of such facts occurring to any of several parties to a suit, the suit may proceed for or against the others, if the cause of suit survive to or against them, but does not say what causes shall or shall not survive to or against the others; the second clause of section 2, provides for the revival of any action, in the same manner as actions arising out of contract, but does not designate the persons to or against whom "any action" may be revived.

Section 4 provides for *scire facias* against the committee of insane person or convict, personal representative, heir or devisee, but does not say in what cases the heir and in what the devisee, and in what cases the personal representative shall be the party in whose name the suit shall be revived. In case the plaintiff dies, the person or persons for whom such *scire facias* might be sued out may move that the suit proceed, &c.

Section 5 provides for the entering of an order for the case to proceed *in the name of the proper party.*

Nowhere in the chapter is the right, which the decedent was seeking to enforce, transferred from him to any other person; the right does pass sometimes to one and sometimes to another, but not by virtue of anything in this chapter. From an examination of the whole chapter it would seem clear that no new right is conferred upon any person; if any new right is conferred, then there is an entire failure to designate any person upon whom it is conferred. There is no substantive law in the chapter, and it is all devoted to matter of procedure. It directs the

manner in which particular persons may enforce the right, which the decedent was seeking to enforce in his action, and which has passed by virtue of other law to them.

No person can claim the right to appear as the decedent's successor by virtue of anything in this chapter.

That the object of the statute was to correct certain inconveniences in practice, and not to give a new and very far-reaching right, is the construction which the Court of Appeals of West Virginia has put upon it, in Cunningham vs. Sayre, 21 W. Va. 440.

After stating the general rule of the common law as to abatement, the Court says: "When the Legislature in the statute above referred to used the language, that 'if a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution, *in the same manner as if it were a cause of action arising out of contract*,' it is evident, that it referred in the last clause of the section to the general common law rule, that '*actions founded on contracts* survived.' It was found that great inconvenience arose in following the technical rule of the common law in abating actions, where the personal representative, his heir or devisee, might bring another suit to accomplish substantially the same object had in view by the ancestor in bringing the original suit, and the manifest object of the statute was to enlarge the remedy so that the suit might be revived. It was not the object of the statute to create any new right, and give an action to the heir, devisee or representative, which he had not at common law. But where the representative, heir, &c., had a right, by suit, to accomplish the same object, substantially, as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived."

In construing this section, the Court finds that the object of the Act was only to avoid the inconvenience

pointed out, and that the meaning of it is, that any particular action should survive, whether contract or tort, in the same manner as actions arising out of contract had theretofore survived; that is, when the right, which was sought to be enforced, survived.

This was a case of unlawful detainer, and the Court was of necessity compelled to pass upon the whole statute, and the meaning and effect of it in all cases. It will be noted that in this case the suit was revived in the name of the devisees, they being by common law the proper parties. The Court says: "The suit which the ancestor brought was sufficient to acquire possession, and the statute intended, in case of his death, that his heirs or devisees, *who took his place with reference to that right*, may revive the suit and prosecute it." Evidently the right, which the heirs or devisees took, they took by the common law; this statute merely allowed them to prosecute, in the pending suit, the right which had been given to them by the common law.

In the case of Curry vs. Mannington, 23 W. Va. 14, the question whether a cause of action for personal injuries survived was directly presented and decided. In that case, an action for personal injuries, trial was had without replication, and there being a plea of the Statute of Limitations, to which a replication was necessary to make an issue, it was necessary to decide whether that plea was or was not material. Whether that plea was material depended upon the period of limitation, which in its turn depended upon whether the action was one which could or could not be brought by or against a personal representative. The Court held that the rule that personal actions die with the person, applied rigidly in cases of injuries to the person, the only exception being actions under their death statute, and that no action could be supported by or against a personal representative in such cases. We have, then, a decision in Cunningham vs. Sayre, *ante*, that a particular action survives only when the heir, personal

representative, &c., can maintain an action to accomplish the same object, and in Curry vs. Mannington, *ante*, that the personal representative cannot support an action for personal injuries.

The first case decides that the particular action survives only when the representative can maintain a new action, and the second that the representative cannot maintain a new action for personal injuries.

The section to which the Court refers in Curry vs. Mannington, *ante*, as giving the right to a personal representative to bring an action for wrongs done the estate of his decedent, is "an action of trespass, or trespass on the case may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of or damage to, any estate of or by his decedent." (Code W. Va., chapter 85, section 20.) It is also thought necessary in section 22 of that chapter to give to the administrator *de bonis non*, in express terms, the right to revive a suit brought by a former administrator. To give to the last clause of section 2 the effect of reviving all actions, would be to make a short section of a practice act create new rights, of much greater importance than those conferred by the direct and explicit terms of the sections above. It would seem that the Court was right in refusing to say that such rights can be created by merely saying, any action may be revived, and without any designation of the person to or against whom this right is given. And the fact that representatives have no power to institute an action for personal injuries, slander, &c., as is said to be the law in West Virginia, in Curry vs. Mannington, *ante*, would render it more unlikely that this right was intended to be given, since there would seem to be no reason for making the particular action survive, when the cause of action, if suit had not been brought, would not survive. If this act revives all actions, then the actions of slander, breach of promise of marriage, &c., survive, actions which it has been the universal policy of the law, for good reasons, to allow to die with the parties.

A good illustration of the view taken by the Courts, of statutes of this kind, occurs in the Maryland law on this subject. An Act of 1785, chapter 80, provided: "That no action brought, or to be brought, in any Court of law in this State, shall abate by the death of either of the parties to such action, but upon the death of any defendant, in a case where the action by such death would have abated before this Act, the action shall be continued," followed by provision for bringing in the proper person; "and in case the plaintiff or plaintiffs, in any action aforesaid, shall die before the same may be tried and judgment given, and such death would abate the action before this Act, the appearance of the heir, devisee, executor or administrator, as the case may require, or other proper person to prosecute such suits, shall be admitted to be entered to the same." There is no exception in the Act as to any class of actions.

The Act of 1798, chapter 101, sub-chapter 14, section 4, provided: "No personal action shall abate by the death of either party, but executors and administrators shall notice and conform to the directions of the Act of 1785, chapter 80, respecting their prosecution or defence of such action."

The Court of Appeals of Maryland, in Railroad Co. vs. Ritchie, 31 Md. 191, speaking of these statutes, says: "Suits for injuries to the person or character die with the person, and cannot be maintained by the representatives of the deceased party. Before the Acts of 1785, chapter 80, and 1798, chapter 101, sub-chapter 14, section 4, all personal actions abated by the death of a party, and it was necessary for his representatives to commence the action anew; and the object of those Acts was to prevent this inconvenience and delay, and to enable the representatives of deceased parties to prosecute such actions as had been instituted by their decedents, during their lives, and which did not die with person. Those acts were never intended, however, to prevent the abatement of actions which died with the person."

To the same effect is
Flynn vs Perkins
8 Jur. 8 (N. S.) 1177

It is perfectly clear that, had the plaintiff in error died before commencing suit, his administrator could not have sued for the injuries alleged in this case.

This is the common law of West Virginia, as decided by the Court of Appeals of that State, in Curry vs. Mannington. It would be strange, then, that the administrator would have a right to revive a suit which he had no right to begin.

It is admitted that the personal representative could not have begun *this* suit; it is claimed, however, that he can now prosecute this action, begun by the decedent. This claim is made under the terms of the procedure statute, to which we have referred, viz, section 2, chapter 127, Code of West Virginia. When closely examined, this practice Act gives no such right to the personal representative.

It is a universal rule of the common law, that the right of action for personal injuries ceases upon the death of the person causing or suffering the injury.

It is a further rule of the common law, that the class of actions known as personal actions, abate upon the death of either party.

The abatement of a particular action, and the ceasing altogether of any right of suit, in any person, for the particular injuries alleged, in a particular action, are very different things.

A statute which simply provides, that certain actions shall not abate, only secures to the particular persons to whom the right or claim asserted in that action would, by law, have descended, the privilege of reviving or continuing the action in their names and for their benefit.

We must, however, in such cases, look to the substantive law—either common or statute—to ascertain the persons to whom the right or claim has descended.

In this case, the substantive law of West Virginia, *i. e.*, chapter 85, section 20, above quoted, expressly provides,

that the right to sue for *injuries* to the *property* of a decedant shall belong to the personal representative.

There is no statute of West Virginia giving to personal representatives the right to sue for injuries to the *person* of a decedent. The right of action or the right to have any action for such injuries ceases entirely, upon the death of the party injured. There is no one to whom that right descends. The procedure Act above quoted, chapter 127, simply provides, that actions shall not abate on the death of a party, and then provides the mode by which the parties to whom the *right of action* descends by law, *i. e.*, heir, devisee, personal representative, &c., may come into the case, revive the action and continue that proceeding to judgment for the enforcement of their right.

This chapter *assumes* that there are *persons*, to whom the right, which the decedent had, descends—that these persons could enforce that right in an appropriate suit, begun by them—and then provides, that instead of commencing a new suit, they may come in and continue the old.

What law, in West Virginia, is there that gives to the personal representative of a decedent, the damages the latter might have recovered for injuries to his person?

The Act we have cited gives to such representative the damages arising from injuries to the decedent's personal or real property—but not damages for injuries to the person. When we look therefore at section 2, chapter 127, which provides that actions may be revived upon the death of a party, and furnishes the machinery for such revival, we do not find a single word that confers on the personal representative any right of action whatever. It might just as well be claimed that the right of action, or the right to revive the action, was conferred on heir or devisee.

We must go beyond this statute to find the persons who have the *rights* which were being enforced in the particular suit.

If there are no such persons—in other words, if the right of action has not been conferred on some person by the substantive law, then there can be no revivor.

This procedure Act, providing against the abatement of actions, as determined by the Court of Appeals of West Virginia, in Cunningham vs. Sayre, did not confer any new right of action on anybody, but only provided for the enforcement of existing rights by those who had them in the particular proceeding begun by the decedent.

This case is an authoritative construction of chapter 127 of the Code of West Virginia, and supports the view for which we contend, viz., that that chapter is a simple procedure Act, providing for the revival of actions, when there were persons to whom the right of action belonged; that it assumes that there are such persons, and provides the mode of their being made parties; but this chapter does not undertake to confer a new right of action on heir, devisee or personal representative where none existed before.

By well-settled law in West Virginia, claims for personal injuries die with the person. There is no party upon whom those claims descends at law, and, therefore, there is no party to revive the action under the procedure Act, as provided in chapter 127.

JOHN K. COWEN,

Attorney for Defendant in Error.

APPENDIX.

CODE OF WEST VIRGINIA.

CHAPTER CXXVII.

Of the Death or Change of Parties, and the Discontinuance of Causes Not Prosecuted.

1. Where a party dies or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee, cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

2. Where such fact occurs in any stage of a cause, whether it be in a Court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

3. If, in any case of appeal, writ of error, or *supersedeas*, which is now or may hereafter be pending, there be at any time in an Appellate Court, suggested or relied on in abatement, the death of a party, or any other fact which, if it had occurred after verdict in an action, would not have prevented judgment being entered (as if it had not occurred), the Appellate Court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred.

4. In any stage of any case, a *scire facias* may be sued out for or against the committee of any party who is insane or a convict; or for or against a party before insane, the powers of whose committee have ceased; or for or against the personal representative of the decedent who, or whose personal representative, was a party; or for or against the heirs or devisees of a decedent who was a party; or for the assignee or beneficiary party, to show cause why the suit should not proceed in the name of him or them. Or where the party dying or whose powers cease, or such insane person or convict, is plaintiff or appellant, the person or persons for whom such *scire facias* might be sued out, may, without notice or *scire facias*, move that the suit proceed in his or their name. In the former case, after service of the *scire facias*, or in the latter case, on such motion if no sufficient cause be shown against it, an order shall be entered that the suit proceed according to such *scire facias* or motion. Any such new party (except in an Appellate Court) may have a continuance of the case at the term at which such order is entered; and the Court may allow him to plead anew or amend the pleadings as far as it deems reasonable; but in other respects the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion.

5. The clerk of the Court in which the case is, may issue such *scire facias* at any time, and an order may be entered at rules for the case to proceed in the name of the proper party, although the case be on the Court docket.

6. Where the party whose powers cease is defendant, the plaintiff may continue his suit against him to final judgment or decree; but he shall not, at law, proceed in the same action against such defendant and his successor, nor shall he, in equity, proceed against both upon his previous bill, unless an order that the suit proceed against

the former party, be entered at the first term after service of the *scire facias* for or against such successor.

7. If the committee, personal representative, heirs or devisees of the plaintiff or appellant who was a party, or of the decedent whose personal representative was plaintiff or appellant, shall not make such motion or apply for such *scire facias* at or before the second term of the Court next after that at which there may have been a suggestion on the record, of the fact making such *scire facias* or motion proper, the suit of such plaintiff or appellant shall be discontinued, unless good cause be shown to the contrary.

8. Any Court, in which is pending any case wherein for more than four years, there has been no order or proceeding but to continue it, may, in its discretion, order such case to be struck from its docket; and it shall thereby be discontinued. A Court making such order may direct it to be published in such newspaper as it may name.

9. When in any suit in equity, the number of parties exceeds thirty, and anyone of said parties, jointly interested with others in any question arising therein, shall die, the Court may nevertheless proceed, if in its opinion all classes of interest in the case are represented, and the interest of no one will be prejudiced by the trial of the cause, to render a decree in such suit as if such person were alive, decreeing to the heirs-at-law, distributees or representatives of such person, as the case may require, such interest as such person would have been entitled to, had such person been alive at the date of the decree.

10. The provisions of the fourteenth section of chapter one hundred and twenty-four shall apply to decrees entered under the preceding section.

11. Any Circuit Court may, on motion, reinstate on the trial docket of the Court, any case dismissed, and set aside any non-suit that may be entered by reason of the non-appearance of the plaintiff, within three terms after the order of dismissal may have been made, or order of non-suit entered.

12. All causes in which orders of dismissal have been made, or orders of non-suit entered, which orders have been set aside and causes reinstated, shall remain upon the docket, and be proceeded with in the same manner as if the order had never been made; *provided*, that no such cause shall be brought to trial, or proceeded in, until the defendant therein shall have had at least thirty days' personal notice in writing, or if he be a non-resident, by the publication of such notice once in each week for four successive weeks, in some newspaper designated by the Court, that said cause has been reinstated on the docket.

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JAMES. H. McKENNEY.
CLERK.

J. Wilson Martin,

vs.

B. & O. R. R. Co.

ON WRIT OF ERROR.

J. WILSON MARTIN,

vs.

THE B. & O. R. R. CO.

On Writ of Error.

NOTE FOR PLAINTIFF IN ERROR ON THE MOTION TO DISMISS.

At common law actions for personal injuries died with the death of either the person suffering or the person inflicting them; actions arising out of contract did not so die, but might be prosecuted by the heir or personal representative to judgment and execution. In the early days of the common law all actions, whether founded on a cause of action which survived or not, abated with the death of either party, and a new action had to be commenced. This rule as to abatement has been changed in England and in all jurisdictions in this country, where the action arises out of contract, that is, where it is of such a nature as, in legal language, will survive a death of one of the parties; it remains unchanged still in all States, so far as we know, except West Virginia, in all those cases where the cause of action does not survive.

Our *statute* law preserves the right of action in all cases where the action has been commenced before a death happens; it makes no difference whether the action is founded on contract or on an injury to the person, it treats both alike. Sec. 2, chap. 127 of the Code says: "Where such fact (that is death of a party, etc., as stated in sec. 1 of the same chapter) occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occurs as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the suit survives to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and

prosecuted to judgment and execution, as if it were for a cause of action arising out of contract."

The last sentence of the above section was added to the first in 1868, and never has been passed upon in a case of this kind by our Court of Appeals; it has only been considered in an action of unlawful detainer where a death had occurred, which it was held, might be revived, thereby changing the rule that had been previously followed. Cunningham vs. Sayre 21 W. Va. 440. The language of the section, however, does not need construction. It is too plain even for misconstruction. No two minds can reasonably differ as to its meaning. "Any action," (certainly including this one) "whether the cause of action would survive at common law or not, may be revived and prosecuted to judgment and execution as if it were for a cause arising out of contract." If the action were founded on contract, it is admitted by all, this cause would not abate or the right of action cease; by this statute a tort is placed on the same footing, and an action on it does not cease, any more than, "if it arose out of contract."

Neither does the fact that the writ of error is pending in the Supreme Court of the United States, and that the revival must be had there, change the effect of this statute. Any confusion in our ideas on the subject will be removed, if we look upon the case as though the death had happened while the action was pending in the Circuit Court for the District of West Virginia, or after it had been removed there for trial. No doubt could or would be entertained in that event as to the right to revive the action and prosecute it to judgment, "as if it were for an action arising out of contract." The Circuit Courts simply administer the State laws. The right of action and rights of property, when they arise, how preserved, or transmitted, or continued in existence, are controlled by the State laws and statutes. The Federal Courts may construe State Statutes but cannot disregard them. As sec. 721 of the Rev. St. of U. S. says: "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be re-

garded as rules of decision in trials of common law, in the Courts of the United States in cases where they apply."

The case under consideration does not arise under the treaties, Statutes of the U. S. or the Constitution; it does not depend as to the survival of the right of action upon a question of commercial law or general jurisprudence; it is simply one of the ordinary questions of property rights, depending solely upon the State law on the subject. The Circuit Court would be obliged to recognize the statute in question and give to it the proper effect; the Supreme Court of the U. S. sitting for the purpose solely of reviewing the action of the Circuit Court, certainly will not feel at liberty to revert to the common law, when the Circuit Court could not. As soon might we contend that the Supreme Court might adopt the common law, in cases of injury resulting in death, where the State Statute had given a remedy, although the common law offered none.

The motion to dismiss involves the question of the *jurisdiction* of the Federal Courts. If the latter have no jurisdiction, by what authority do they proceed to dismiss? To dismiss, is to give final judgment. But how can the Federal Court proceed to final judgment between parties over whom they have no jurisdiction? For the purpose of the present argument, let us concede the case improperly removed, because the parties were both citizens of West Virginia; while pending in the Circuit Court of the United States the plaintiff dies, and the case is revived in the name of the administrator, whereupon the defendant moves to dismiss; could the Circuit Court properly proceed to pass upon and construe the State law and give final judgment of dismissal? On the contrary, is it not too plain for argument that the Circuit Court could do *nothing* legally, except remand the case and remit to the proper State tribunal the solution of the questions of abatement, dismissal and all other collateral issues involving the substantial rights of the parties.

Neither is the case in anywise different, when the motion to dismiss is made in the appellate court. On the hypothesis upon which we are now proceeding,—that the parties are both residents of West Virginia, this Court cannot proceed to a

final judgment of dismissal against us; on the contrary, it can *do nothing* in the premises, except to correct the error of the Circuit Court in refusing to remand.

I remark, further, that if the plaintiff were a citizen of West Virginia, and the defendant of Maryland, and the alleged tort was committed in the latter State, an interesting question might arise—as to whether the case should be governed by common law, as to the abatement, and survival, or by the law of the forum.

On the other hand, if both parties were citizens of West Virginia, I apprehend there could be no controversy upon the position that the question of survival of action should be determined by the laws of that State.

In any event, therefore, the preliminary and jurisdictional question of *citizenship* must be determined *in limine*, before the motion to dismiss can be disposed of.

Upon this question, I beg leave to refer the Court to my Brief, already filed in the case, commencing at page 16, and including the appendix. I respectfully request that the same may be regarded as incorporated in this note.

And to the same I beg leave to add the following observations upon the subject of the citizenship of the Baltimore & Ohio Railroad.

It will be observed that in my printed Brief heretofore filed, I have brought all of the leading cases into review, and juxta position, down to the case of Penn. Co., vs. St. L. & A. Co., decided in 118 U. S. R. 265.

I have made an honest effort to reconcile them, and if I have failed, I may be pardoned for suggesting that the inherent difficulty of the task was not inconsiderable.

In the present case, this Court will have an opportunity to deliberate upon, and settle questions of profound interest:

(1). Can a railway corporation be a citizen of more than one State; or does it retain exclusive citizenship in the State where first incorporated?

(2). What is the true distinction between re-incorporation or re-charter, and a mere grant of corporate privilege or license?

The learned counsel for the defendant in error cites two decisions of the Supreme Court of Appeals of West Virginia, which he thinks have a bearing in this decision.

The first is Cunningham v. Sayre, 21 W. Va., 440, and the second is Curry v. Mannington, 23 W. Va., 14.

In regard to the first, the quotation from Judge Johnson was purely *obiter dictum*, as the question was not in the least involved. To test this let us revert to the *syllabus*.

Under a peculiar provision of the Constitution of West Virginia it is made the duty of the Court "*to prepare a syllabus of the points adjudicated in each case*" and hence we look to the syllabus, and to that only, to ascertain what has been adjudicated. Turning to the syllabus in the case of Sayre v. Cunningham, we find no reference whatever to the point upon which Judge Johnson has incidentally given his individual opinion.

In the second case, Curry vs. Mannington, the question involved was whether the personal representative *could bring an original action* for injury to the person of his decedent; an entirely different question from the one now under discussion, which is, whether the deceased having elected in his life time to bring, and having brought such a suit, is not the representative authorized to complete the litigation by carrying it on, in his own name, to final judgment? We think he is by the express and unequivocal terms of the Act which we are considering. As shown in our Brief, the last sentence in section 2 of ch. 127, was *added by the Revisors in 1868*, and if it was not intended to change the common law as to personal injuries, it can have no other possible purpose or meaning.

The learned counsel argues in objection to our documentary evidence as follows:

"The private acts of Virginia granting the license to the Baltimore & Ohio Railroad Company, the resolution of the West Virginia Legislature and the letter of the President of the Rail-

road Company, are not such records that the Court can be presumed to have taken judicial cognizance of them, and not having been properly proved before the lower Court, and appearing in the record, it is not proper to consider them here."

(1). If this position is sound, the Court cannot consider the Maryland charter, and there is no proof of non-residence.

(2). We offered our sworn plea in abatement, which was rejected, and this we have assigned as error, (Rec. p 64).

(3). But the Code of West Virginia requires the Courts to take judicial cognizance of the Acts of the Legislature: and the Court did so, as appears by its order on p 10, of the Rec. See Code of West Virginia, sec. 1, ch. 130.

DANIEL B. LUCAS.

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CLERK.

J. WILSON MARTIN,
Plaintiff in Error,

vs.

THE BATIMORE AND OHIO RAILROAD CO.,
Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1892.

BRIEF FOR PLAINTIFF IN ERROR,

BY DANIEL B. LUCAS.

WITH AN APPENDIX,

CONTAINING THE ORIGINAL CHARTER OF THE BALTIMORE AND OHIO RAILROAD COMPANY, THE LAWS IN MARYLAND, VIRGINIA AND WEST VIRGINIA, AND EXTRACTS FROM THE GENERAL RAILROAD LAW.

REGISTER PRINT, WHEELING, W. VA.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

J. WILSON MARTIN, *Plaintiff in Error*,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

THE MERITS.

STATEMENT OF FACTS.

On the 16th day of November, 1886, J. Wilson Martin, the plaintiff, was employed by the B. & O. R. R. Co. as a second grade climber in the telegraph department, his duties being to assist in constructing and repairing the defendant's telegraph lines. He was then only nineteen years of age. At the time of his employment he was required to become a member of the B. & O. Employees' Relief Association; a corporation organ-

ized under the laws of the State of Maryland separate and distinct from the B. & O. R. R. Co. As appears from the documentary evidence in the case, the only connection the defendant company had with the Relief Association arose out of the fact that the former had at the organization of the latter contributed or agreed to pay the sum of $100,000 into its treasury and had also guaranteed the payment of the sick, disability and death benefits agreed to be paid by the Relief Association to its members. These corporations and their management were each independent of the other. By his application for membership in this Association, so far as it is necessary to to state it in considering the case, the plaintiff authorizes the defendant company to retain from his wages as its employee the sum of $1.50 each month to pay his dues in the Relief Association; he also agrees that the defendant company shall not be liable for any injuries to himself received while he was in its employment whether caused by the negligence of the company or its employees; that the association, might as a condition precedent to paying any disability or death benefits, demand any such receipts or releases as would be needed to discharge the defendant company from liability for such negligence; that his application which is signed by himself alone, shall when accepted by the Relief Association, constitute a contract with the defendant company; and that his discharge by the B. & O. R. R. Co. shall terminate his membership in this association and his right to sick, disability or death benefits. The plaintiff's father consented to his signing this contract. Attached to this application is another agreement under seal; by which the infant plaintiff and his father and mother, after reciting his employment "subject to discharge at the pleasure of the company" and his "great risk of personal injury from the neglect of other employees, agents and officers of the said company, and from defects of machinery and from other causes, "release and forever discharge the B. & O. R. R. Co. from all claims and liability for damages, for injury to the plaintiff no matter how occasioned, whether by negligence of fellow servants or others."

He became an employee and worked at constructing and repairing telegraph lines for a period of about six months, when on Sunday, May 22, 1887, he suffered the injuries on which this

suit is based. The testimony in the record shows a general state of facts as follows:

On May 21st, the day prior to the accident, the plaintiff was working near Piedmont, W. Va., and the gang or "camp," of which he was a part, got orders to go to Chester, Pa., where they would find other work. The plaintiff was in a gang of men under J. S. Turner as foreman: he employed and discharged the men and gave orders as to what they should do: the gang had three cars, one for material, one for cooking purposes and one to sleep in, the two last named being passenger coaches; they lived in them when stationed at a particular place, and when going to another place to work, these cars were trausported by attaching them to a freight train, and the members of the camp rode in them, but had no connection with or control over the crew of the transporting train. They were not on duty at the time, and were not paid anything for their services on the day of the accident. The plaintiff, when the train on the trip in question passed Martinsburg, stopped off to see his parents, and joined the gang the next day at Bayview Station, Md. The train with the camp cars reached Bayview about noon on Sunday, May 22, 1887: the train, consisting in all of some ten or twelve cars, was left on a side track, or dead track, in the yard at Bayview, where they lay from noon when they arrived until late in the evening when the accident happened. The casualty was due to a locomotive and train of cars of the defendant and under the control of its servants running into the rear end of the train of cars in which the plaintiff's camp was lying. There is some immaterial confusion as to how it happened: but, in any event, a switch was either negligently left open, or thrown open by the yard clerk or train men of the defendant. The collision train was only going at the rate of 3 to 6 miles an hour when it struck: there were four other cars composing Zepp's camp between the plaintiff's position and the end struck: the engine was not damaged: the shock, as described by those on the intervening cars, was very slight, and no damage was done to any of those cars except a slight break of the steps or platform of one of Zepp's camp, which would have hurt no one on its platform. Four men of Turner's camp were on the platforms between the cooking and sleeping car of his camp. The plaintiff had been

sitting on the brake-wheel; the others sitting around in different positions. The plaintiff, when the colliding train was approaching, got down from the position on the brake-wheel and was in the act of entering the sleeping car when the shock came. The platforms of both these cars were smashed off and all four men on them badly hurt, one being killed. The main beams supporting the platforms and timbers were badly rotten, and broke at the shock, allowing the cars to telescope. These cars were not safe for the transportation of people; and this fact was certainly known to J. S. Turner, the foreman of the camp, to different repairmen of the company, and by a proper inspection might have been known to the company itself. There had been no inspection of these cars at any time; repair men had stated, in the hearing of several of the witnesses, that they were not worth repairing, that they were not safe, and the foreman, Turner, even told one witness while on the trip in question to sleep with his clothes on, as there might be an accident by reason of the condition of the cars. The plaintiff, it does not appear, knew anything of the dangerous condition of the cars. But for this defect in the cars, it is very clearly shown the collision would have hurt nobody.

After the accident above mentioned, the plaintiff, in accordance with his application for membership in the Relief Association, received several sums as disability benefits; and was required before he got the money to sign the several receipts printed in the record [p. 53], which receipt also contained words of release and discharge of the defendant company from all liability to the plaintiff for those injuries. These receipts, it is contended, are also releases, though according to the common law, and the laws of West Virginia, they were not under seal. The plaintiff when he signed them was an infant.

From this general resume of the evidence as it is to be found in the bills of exceptions taken at the trial, we can more readily see the errors assigned in the pleadings and instructions. After the plaintiff's motion to remand and the defendant's demurrer to the declaration were overruled, the defendant, in addition to the general issue, tendered a special plea of release based upon the application of membership, the release thereto attached and the several receipts taken after the injuries had been inflicted, as already set forth. To the filing of this plea

the plaintiff objected: the objection was overruled: he then demurred to it, which was also overruled: and he excepted to the action of the court in both instances. The plaintiff then replied generally to this special plea, and under our statute admitting of several replications, also replied that at the time of executing the said several supposed releases, he was infant under the age of twenty-one years: to which special replication the defendant demurred, and his demurrer was sustained, and again the plaintiff excepted. The trial before the jury followed; and the facts above set forth having been proved, the court, against the objection of the plaintiff, gave the first and second instructions as found on page 59 of the record; and also, against the objection of the plaintiff, instructed the jury to find a verdict for the defendant, as set forth in 4th Bill of Ex., p. 60 of the record. Plainsiff excepted, tendered his several bills of exceptions, had the evidence certified, and has prosecuted his writ of error to this court.

The exceptions above stated, viz: the overruling of the plaintiff's objection to the filing of the special plea of release and of his demurrer thereto, the sustaining of the demurrer to plaintiff's special replication of infancy, and the second instruction and the general instruction to find for the defendant, all of which are assigned as error, raise the question as to whether or not the plaintiff is barred from recovering by reason of the supposed releases: and the plaintiff's exceptions to the giving of the first instruction, and also the general instruction to find for the defendant, which are likewise assigned as errors, raise the question as to whether the defendant was, as a matter of law, guilty of contributory negligence, and whether he was a fellow servant with the parties whose negligence caused the injury. We will consider the general questions in their order.

I.

Did the Plaintiff Release the Defendant, and is he Barred from Recovering by Reason Thereof.

The application and release thereto attached, so far as it stipulates for exemption from liability for future injuries arising from the negligence of the master or its servants, other than fellow-servants, is void as against public policy and mor-

ality. A contrary rule would be subversive of all those principles by which common carriers are held to a strict accountability for their negligence, and would promote carelessness and laxity in dealings where great care is exacted. Bishop's Non-Contract Law, sections 1074 to 1076; *New York Cen. R. R.* v. *Lockwood* 17 *Wall*, 357; *Philadelphia and Reading R. R. Co.* v. *Derby* 14 *How.*; *Express Co.* v. *Caldwell*, 21 Wall 268; *Railrord Co.* v. *Pratt*, 22 Wall 123; *Chicago & Milwaukee R. R. Co.* v. *Ross*, 112 U. S. 377. Assuming, for argument, that plaintiff was a fellow-servant and not a passenger at the time he was injured, the rule is the same, and is made necessary, by as strong, if indeed not stronger rules of public policy. *Hough* v. *R. R. Co.*, 100 U. S. 213 and 218; and *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. In the case last named, on page 652, the court says, "The same considerations which make him (the common carrier using steam as a motive power) responsible in such cases for the safe transportation of passengers and property should also impose upon him an equal responsibility to his employees, so far as their safety depends upon the character and condition of the machinery and appliances used in transportation." The contract and release in the record not only extend to the negligence of fellow-servants, as to which the carrier may legally stipulate for exemption and require the employee to assume: but they also include defects of machinery, negligence of inspectors, supervisors and others, which are duties of the master, and which he is not permitted to evade.

They ought not to prevent the plaintiff from maintaining his action, for another reason, which applies with equal force to the alleged releases taken from him after the injuries had been received; that is, that the plaintiff, at the time he executed them, was an *infant*, and both before and after arriving at full age, he elected to disaffirm them.

The law is well settled, that all contracts of an infant, except those for necessaries and such as he is by law compelled to execute, are either void or voidable at his election: that he may exercise his power to disaffirm the contract either before or after he arrives at full age, without first restoring, or offering to restore, the consideration received by him, and that the bringing of a suit and prosecuting it is a most unequivocal act

of disaffirmation. *Sims* v. *Everhart*, 102 U. S. 300; *Irvine* v. *Irvine*, 9 Wall. 617; *Mustard* v. *Wohlford's Heirs*. 15 Gratt. 329. See also the elaborate note of Mr. Freeman in Vol. 18, Am. St. Reports, extending from pages 555 to 722; and especially the following pages: 578, 579, 618 and 619, 623, 667, 668, 669; where every proposition is fully supported by authorities that need not be cited here, but will be found to sustain the doctrines as we have stated them.

On page 618 of the note referred to, the exact point involved in this case is discussed. The editor says: "An infant's release of a claim on account of personal injuries sustained by him by reason of the tort of the release is not binding, nor is it void, but it is voidable by him at his election, and constitutes no bar to an action to recover damages for the injuries; *Baker* v. *Lorett*, 6 Mass. 78; *St. Louis, etc., R'y* v. *Higgins*, 44 Ark. 293; and the bringing of a suit upon the claim is an unequivocal act of disaffirmance." *St. Louis, etc., R'y* v. *Higgins*, 44 Ark. 293. The point involved in the last named case was precisely like the one at bar; and the facts also are very similar. Higgins, an infant 19 years of age, was in the employ of the company under a contract of service; while in the discharge of his duties as such he suffered the injuries upon which he based his action, suing in the name of his next friend; the company set up, among other defenses, that about four months after the injury, he had in consideration of $125.00 released in writing his right of action; the plaintiff replied that at the time of making it he was an infant; and the court held as above stated, with the additional doctrine that he was not obliged to refund the consideration before being entitled to disavow his release. That the plaintiff here had agreed in advance as a part of his contract of employment to give this release can make no difference; especially when we consider the unjust, not to say illegal, character of his contract with the Relief Association, which left him liable to discharge by the railroad company at its pleasure, and forfeited all of his rights in the Relief Association when he was so discharged.

For these reasons we think the court below erred in overruling the demurrer and objection to the special plea of release; in sustaining the demurrer to the plaintiff's special replication of infancy, and in giving the second instruction, and also in directing a verdict for the defendant.

II.

Is the Plaintiff Barred from Maintaining his Action by Reason of Contributory Negligence, or because he was a Fellow-Servant with those whose Negligence Caused the Injury?

1st. *Was the plaintiff guilty of contributory negligence?* The instruction of the judge in this respect proceeds upon the idea that the plaintiff was guilty as a matter of law of a want of ordinary care in being upon the platform of the car at the time of the injury. The instruction also alludes to his position on the brake-wheel; but we think this need not be considered, as the evidence clearly shows that he was not there when injured, but in the act of entering his car with his hand upon the door knob; and, moreover, all the others who were in different positions on the platform were badly hurt, some much worse than he.

This court, in the case of *Railroad* v. *Jones*, 95 U. S. on page 441 of the opinion, speaking of contributory negligence, says: "Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. * * * The duty is dictated and measured by the exigences of the occasion." This is the approved doctrine and has been announced in numerous decisions of this court. Further, in *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, on page 428–9 of the opinion, the court says: "As the question of negligence on the part of the defendent was one of fact for the jury to determine, under all of the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence * * was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more an absolute standard of ordinary care and diligence in the one instance than in the other." And on page 417 of the same opinion, the court says:

"It is only when the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts; if reasonable men, considering all of the circumstances, and situations of the parties, may fairly differ upon the question, it should be left to the jury." The judge below decides by his ruling that the plaintiff was doing what a reasonable and prudent person would not do, and that the circumstances were such that reasonable men might not fairly differ in their conclusions, but his conduct was negligence *per se*.

The plaintiff and three others were on the platform; the train was on a side track or dead track in a yard of the defendant company; they had been lying there for a period of several hours; there was no engine attached to their train and no prospect that it would be set in motion; it is not shown that they were violating any rule of the company in being there, nor that they were warned by any member of the crew, that their position was a dangerous one. Under these circumstances we think it impossible to say the plaintiff was doing what a reasonable or prudent man would not do, when he was only doing what three other presumably prudent men were doing. Nay, on the contrary, we think that any reasonable and prudent man will agree that he was not doing a dangerous or improper thing.

All of the cases so far as we have been able to examine them, which hold that it is negligence to stand on the platform, limit it to being there *while the train is in motion*; and that for the company to defend on this ground it must show that the plaintiff was advised of his danger by some one in authority on the train. Wharton on Neg., sec. 364. Whether it is contributory negligence or not, must depend on all the circumstances of the case, and be determined by the jury. Bishop Non-Contract Law, sec. 1106. In *Nalon* v. *R. R. Co.*, 87 New York, 63, the court says: "It is settled that independent of the mandate of the statute, it is not even in the case of steam cars, negligence *per se* for a passenger to stand upon the platform of a moving car." This seems to be the well settled doctrine. *Goodrich* v. *Penn. and N. Y. Canal and R. R. Co.*, 29 Hun. 50; *Gerstle* v. *Un. Pac. R. R. Co.*, 23 Mo. Ap. 361. It is only when trains are in motion that a person riding on them has any reason to

apprehend danger from being on the platform: and it is clearly settled, that there must be some knowledge of apprehended danger, or sufficient reason to apprehend it, to put a reasonable or careful man on guard, or there can be no contributory negligence. Am. & Eng. Ency. Law, pages 34 and 35. If a train is running at a high rate of speed a prudent man might have sufficient cause to apprehend it: but certainly not when standing still, and especially under the circumstances of this case.

We wish also to call attention to the qualification to the doctrine of contributory negligence, announced in *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 558, to be applied to the defective condition of the cars. While the plaintiff might have been negligent in being on the platform, yet if the exercise of reasonable care on the part of the defendant in providing safe and suitable cars for his transportation, would have avoided the consequence of his negligence, he is not barred from recovering.

2. *Was the plaintiff a fellow-servant with those whose negligence caused the injury?* The primary cause of the injury is, we think, clearly shown by the evidence to have been the defective condition of the cars, although there was also negligence on the part of the switchman, or trainmen which likewise contributed to it. But the collision contributed by the negligence of the latter would have been harmless had the cars been reasonably safe: as the evidence shows the jar was very slight, and did no damage except to these particular cars, which were very rotten.

The duty to provide safe machinery and to keep and maintain it in a reasonably safe condition is the duty of the corporation which cannot be delegated, so as to exempt itself from liability; and its employees using this machinery are not fellow-servants with those whose duty it is to furnish and keep them in repair. *Railroad Company* v. *Fort*, 17 Wallace, 553 and 557: *Hough* v. *R. R. Co.*, 100 U. S. 213; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. It is also the comprny's duty to inspect its machinery at reasonable intervals. Woods R. R. Law, 1465 to 1469. These cases render useless any further argument on this point.

It does not appear that the plaintiff knew of the defective

condition of these cars; he had a right to assume that the corporation had properly discharged its duty in this respect; his continuance in the company's employ, even after he had actual notice of their defective condition would, if proved, be no more than evidence of contributory negligence on his part to be weighed by the jury; and the burden of proof as to contributory negligence is always on the defendant. *Hough* v. *R. R. Co.*, 100 U. S. 213; *Northern Pac. R. R. Co.* v. *Mares*, 123 U. S. 721. The defendant did not try to meet this burden.

If, therefore, the company contributed to the injury by reason of the defective condition of the cars in which the plaintiff was riding, it is still liable, although the negligence of trainmen who, it may be held, were fellow-servants of his, may have likewise contributed to the accident. *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 700.

In view of the proposition last cited, it would be superfluous to inquire at length whether the plaintiff was a passenger at the time or a fellow-servant with its trainmen; but as the rules of negligence and the degree of care required of a carrier of passengers towards its *passengers*, are different in some respects from that required towards its *employees*, we will call attention briefly to a few principles and authorities. We maintain that he was a passenger, and entitled to the rights of one. He was not on duty at the time; he was not engaged in the work incident to his employment; it was Sunday, and none of them were paid or expected to be paid anything for their services while being transported on this trip; none of them had any connection, direct or remote, with the moving or management of the train. Woods R. R. Law, 1490; *Washburn* v. *R. R. Co.* 3 Head [Tenn.] 638; *Packet Co.* v. *McCue*, 17 Wall. 508; *Baird* v. *Pettit*, 70 Penn. State, 477. Nor was he a fellow-servant with the trainmen. His employment, while by the same common master, was in a department entirely separate and distinct. "The duties of the two did not bring them to work at the same place at the same time, so that the negligence of one in doing his work might injure the other in doing his work; nor did their separate services have an *immediate* common object;" which, in the case of *Randall* v. *The B. & O. R. R. Co.*, 109 U. S. 484, is assumed to be the test of fellow-servancy. We are aware there is great and irreconcilable differ-

ence of opinion among the different courts of the country on this subject. This difference is well discussed in a note to *Fox* v. *Sandford*, 67 Am. Dec. 588. In the older States, where the doctrine was first announced, it is there said, the courts have generally held that all who are employed by the same master in the same general business, without respect to the nature of the employment, are fellow-employees; but in the general extension and diversification of business carried on by the same employer, it has been found this rule often works injustice and hardship, and the tendency of modern authorities appears to be in the direction of such a modification as shall eventually devolve upon the employer a just share of responsibility for the care of its employees. "The tendency of the later decisions," the editor says, "is to regard only those who, in the performance of their respective duties, are so connected or brought into co-operation that the performance of their respective duties will ordinarily bring them into such situations as to expose them to risk or injury from the negligence or carelessness of each other,—a mutual co-operation to accomplish some particular result, a consociation in their ordinary duties." See the cases cited in the note referred to. This is the rule of Illinois, Georgia, Tennessee, Kentucky, West Virginia, Indiana, Ohio, Pennsylvania and other States. It is one, however, which can not be decided by authority, as they are in hopeless confusion; but must be determined from bed-rock principles. The question is, we believe, an open one in this court; though in other cases involving similar principles, this court has shown a tendency to follow the later authorities, and to apply liberal and enlightened principles so as to throw a reasonable degree of liability upon the master. *Chicago & Milwaukee R. R. Co.* v. *Ross*, 112 U. S. 377; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. The courts which adhere to the rule above announced, as to what constitutes fellow-servancy, have also held that a conductor in charge of a train represents the corporation, and it is liable for his negligence, a rule which has been approved by this court; the courts which hold the contrary, have also as a general rule held that a conductor is a fellow-servant, and that the master is not liable for his negligence. An application of the same principles determines this case in favor of the plaintiff.

If, then, the plaintiff was not a fellow-servant at the time he was injured, he was a passenger; and even though riding free, and upon a freight train, the defendant should be held to the highest possible degree of care and diligence. *Ind. and St. Louis R. R. Co.* v. *Horst*, 93 U. S. 291; *R. R. Co.* v. *Lockwood*, 17 Wall. ——; *Phila. & Reading R. R.* v. *Derby*, 14 How. ——. The fact that an accident occurred is *prima facie* proof of negligence. *Stokes* v. *Solstonstall*, 13 Pet. 181; *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551.

For these reasons, we think the court also erred in giving to the jury the first instruction, and also in directing the jury to find for the defendant.

The Right of Removal—Statement of Facts.

This cause was an action for trespass on the case brought by J. Wilson Martin, by John W. Martin, his next friend, against the B. & O. R. R. Co., in the Circuit Court of Berkeley county, West Virginia. The cause of action is for injuries received by the plaintiff on May the 22d, 1887, while being transported on a train of the defendant, through the alleged negligence of the defendant, and its servants. The action was begun on March 1, 1888, by taking out and having served on the defendant a writ returnable to March rules: that is, to the first Monday in March of that year. At the return day of the writ, the declaration was filed; and the common order, that is, a rule to plead, was taken against the defendant; and at the April rules, the defendant still not pleading, the common order was confirmed: that is, an office judgement was taken against the defendant, and a writ of inquiry was awarded. At the next term of court, when the cause came on for a hearing; that is, for the purpose of having executed the writ of inquiry as to the damages sustained by the plaintiff by reason of the matters set forth in his declaration, the defendant appeared, filed a petition with a good and sufficient bond, praying a removal of the cause to the Circuit court of the United States for the district of West Virginia, because of the alleged fact that the B. & O. R. R. Co. was a non-resident of the State of West Virginia. The State court, following the decisions of the State Supreme court, refused to grant the prayer of the petition.

A copy of the record including the petition for removal and the accompanying bond, were, however, at the next term of the Circuit court for the Federal District, presented in court and docketed; thereby effecting under the statutes of the United States and decisions of this court, a removal of the cause. The plaintiff then appeared in the Federal court, and

filed his plea in abatement to the jurisdiction of the court, alleging that the defendant, the B. & O. R. R. Co., was at the time of the removal, a West Virginia corporation, and not entitled to remove to the Federal court. To this plea the defendant company demurred, and the demurrer was sustained. The plaintiff then moved to remand the cause to the State court: which motion was overruled by the court.

These facts raise the question as to the propriety of the removal: and the action of the court in sustaining the demurer to the plaintiff's plea in abatement, and in overruling his motion to remand, is assigned as error.

ARGUMENT OF THIS ASSIGNMENT OF ERROR.

We maintain the removal was improper for two reasons: First, because the application for removal was not made in time, and second, because the B. & O. R. R. Co. is a resident corporation of the State of West Virginia.

1st. *Was the application for removal made in time?*

By section 3, Act of Congress of March 3, 1887, a party desiring to remove on the ground of a different citizenship must file his petition "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." "The general object of this act," as stated by Justice Bradley in the case of *In Re Pennsylvania R. R.* 138 U. S. 451, "was to contract the jurisdiction of the Federal courts." Again, in *Fisk* v. *Henarie*, 142 U. S. 459, Chief Justice Fuller also says its purpose "was manifestly to restrain the volume of litigation pouring into the Federal courts." Accordingly, in construing the section above quoted, this court in the case of *Kansas City Railroad* v. *Daughtry*, held, that "the Statute is imperative that the application to remove must be made when the plea is due," and that, the fact that the plaintiff did not take judgment by reason of the defendant's default, does not enlarge the time within which the removal can be made. Nor does the fact that he may, by leave of the court, plead afterwards in any way affect the result or extend the right of removal."

The question arises then, when, according to the laws of the State of West Virginia, is a defendant required to plead to the declaration of the plaintiff? The time depends somewhat on the character of the plea, but we contend that in any event the petition in the case we are considering was filed too late. All pleas in abatement to the jurisdiction must be pleaded at the rule day at which the declaration is filed; that is, before the common order, or more accurately speaking, the rule to plead, or conditional judgment, is taken: and all pleas in abatement

must be pleaded before an office judgment is taken against the defendant. Pleas to the merits or in bar, may be pleaded at the rules at which the declaration is filed; and are required to be pleaded before the first rule day thereafter: otherwise, the common order is confirmed, that is, an office judgment is taken against the defendant, by reason of his default. Code of West Va., ed. 1891, chap. 125, secs. 1, 5, 6, 16, 44, 45; *Deleplain* v. *Armstrong*, 21 W. Va. 211 and 219. An office judgment entered in this way may be set aside at next term of court, by a plea to the issue, which is the equivalent, under our decisions, of a plea to the merits: but even this right is subject to conditions. Secs. 47 and 48; *Wyche* v. *Macklin*, 2 Rand. 426. In case the defendant fails to appear and plead before the last day of the next term, the judgment entered at rules is extended on the record; or, if it is a case sounding in damages, the writ of inquiry as to the quantum of damages, must also be executed in court; and at the last day of the next term, the office judgment becomes a finality. *Idem.*

In order to fully understand the effect of these provisions, it is essential that we should inquire into the nature of proceedings at rules. Originally all proceedings now had at rules were had in open court; process commencing actions was made returnable to a term of court; rules to declare, to plead, to reply, to rejoin, and so on, until an issue was reached, were all given in court. In this respect, the practice was like the English practice. Tidd's Pr. 122. As there were but a few terms of court each year, this practice was found to occasion great delay, and the Virginia Assembly by a series of acts, extending from 1727, when the first step was taken, to 1785, when the change was completed, adopted as a substitute a series of rules. Robinson's Old Practice, Vol. 1, p. 159; *Kyle* v. *Ford*, 2 Rand. 2. These rules, subject to a few exceptions, are held in the clerk's office on the first Monday of each month; all pleadings are to be filed and all proceedings are to be had there, until an issue is joined or an interlocutory judgment is obtained: and they are orders of the court subject to the control of the court at its next term. Code of W. Va., chap. 125, secs. 1 and 60; 4 Min. Institute, 546, 566, 599 *et seq.* The defendant, served with the original process, must take notice of all other proceedings had in open court.

It follows, then, that the petition for removal should have been filed either at March rules, 1888, or certainly not later than April rules 1888, when the office judgment with a writ of inquiry as to damages was taken against the defendant. At March rules, by the laws of the State, it was required to file any pleas in abatement to the jurisdiction, and any kind of plea in abatement not later than April rules: or it was forever barred from pleading in abatement at all. The defendant

failed to appear then, or to plead; and a rule was given requiring him to plead at the April rules, 1888, under the penalty of having a judgment then taken against him. This rule, while given at rules, is nevertheless an order of the court; and the defendant, still failing to appear and plead, the judgment, as we have seen, was taken, which can only be set aside by a plea to the issue, and then only before the last day of the next term of court. The petition for removal did not come at the time the defendant was required by our laws to plead in abatement, for no plea of that character would have been received after April Rules, 1888; nor was the petition presented at the time the defendant was required by the rule or order of the court, to plead to the merits, which was at the April Rules. Any plea by the defendant after that time, or in court, is a matter of grace, subject to limitation and entirely optional with him; he *may* set aside the office judgment by a plea to the merits, but he is not *required* to do it. *Wyche* v. *Macklin*, 2 Rand. 426; *Hinton* v. *Billard*, 3 W. Va. 309; *Deleplain* v. *Armstrong*, 21 W. Va. 211 and 219.

2. *Is the Baltimore and Ohio Railroad Company, as to its franchises and operations in West Virginia, a "citizen" of that State, and as such incapacitated to remove a case instituted in her courts by another citizen thereof?*

If this court can see its way to decide this question, once for all, it will confer a lasting benefit upon the citizens of a State, three hundred miles of whose territory is traversed by one of the most gigantic railroad corporations of modern times.

At common law, it is said, a corporation could be a citizen of but one State; by the same law, the accident of birth determined the citizenship of a natural person, and the maxim, "once a citizen always a citizen," determined allegiance from the cradle to the grave. 2 Kent's Com. 42, 49; 1 Blacks. Coms. 366 and note 1, also 36, 369–70 and note 5. This rule of common law is now abrogated as to natural persons; and as to artificial persons, whatever the common law may have been, this court has decided that a corporation created by the laws of one State, may duplicate itself by being rechartered in a sister State, and thus become two corporations of the same name and organization, with co-equal powers and capacities. The doctrine of recharter was promulgated and defined by this court, in the case of *Ohio and Memphis R. R. Co.* v. *Wheeler*, 1 Black, 286. In that case, the court said, (on page 297): "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfill-

ing the same duties in both States. Yet it has no legal existence in either State except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may indeed be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovranty which brings it into life, and indues it with its faculties and powers. The president and the directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana, from the corporate body of the same name in Ohio, and they cannot be joined in a suit as the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States." *Railway Company* v. *Witton*, 13 Wall. 270. This doctrine of recharter received further elucidation in the case of the *Memphis and Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581. The syllabus of that case is as follows: "The Memphis and Charleston Railroad Company is made by the statutes of Alabama an Alabama corporation; and although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama." It will be perceived that the doctrine that a corporation must be regarded, by conclusive presumption of law as a "citizen" of that State only, where *first* incorporated, is here entirely discarded: and it is held, that while a corporation may not, indeed, be a "citizen" of more than one State, yet the same organization, organized by virtue of original charter from one State, may constitute itself an independent corporation in another State, by virtue of being rechartered therein; and such independent corporation will be regarded as a domestic corporation of the State where so rechartered.

This principle, recognized by, if not originating in this Court, is thus commented on by Mr. Morawetz, in his admirable work on Private Corporations: "It has been stated in a previous section, that, in construing the constitutional provisions and acts of Congress conferring jurisdiction upon the Circuit Courts of the United States, a corporation must be treated as a citizen of the State from which its franchises are derived. The fran-

chises which a corporation chartered by several States can exercise in either State must be derived from the laws of that State alone. And it has been decided, for the purpose of determining the jurisdiction of the Circuit Courts, a corporation, chartered by several States, must, within the district of either State, be treated as a citizen of that State alone." *Morawetz on Priv. Corp. Sec.* 530.

It is true that Mr. Morawetz takes the view that there is, after all, but *one* corporation. In sec. 528, he says: "But although each charter of a company incorporated by different States can operate as a grant of franchises only within the jurisdiction of the State enacting it, yet the company itself does not on that account cease to be one company, having one undivided enterprise. A company thus constituted, is in reality but a single corporation, formed by agreement of its members for the purpose of carrying on business in a corporate capacity in several States."

For this position, he cites in a note, among other cases, *The Baltimore and Ohio Railroad Company* v. *Harris*, 12 Wall. 82, a case which we now come to discuss.

On the 28th day of February, 1827, was chartered by the Legislature of the State of Maryland, the Baltimore and Ohio Railroad Company. This was prior to the "Rocket" of Stephenson, and this company was the pioneer in long-distance, steam-railway transportation in the United States, and perhaps in the world. For many years, it struggled against forfeiture for bare existence, and a quarter of a century saw the main stem hardly completed. Its route was eighty-two miles through Maryland, and about three hundred through Virginia. I have attached to this brief an appendix containing the charter of Maryland, the recharter of Virginia, the act of March 6th, 1847, the authoritative acknowledgement on the part of the Company of its acceptance of the amendment to its charter by the act of March 6th, 1847, the general railroad law of Virginia, the statutes of West Virginia of 1872–73 and 1882, bearing on the status of railroad companies doing business in West Virginia, under charters granted or laws passed by Virginia or West Virginia. This compilation will render it unnecessary for me to encumber the body of this argument by lengthy extracts from these various laws.

In the case of *The Railroad Company* v. *Harris*, there is an apparent variance of view from the principle laid down in the *Ohio and Mississippi Railroad Company* v. *Wheeler*. The Court itself recognized this fact, and said: "So far as there is anything in the language of the Court in the case of the *Ohio and Mississippi Railroad Company* v. *Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the Court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal Court of that State."

The variance between the two cases is, however, one of theory rather than of practical results. The conclusion in both cases is the same, and it is against the right of removal. In the earlier case, (*Railroad Company* v. *Wheeler*), it was held that the Company could not remove, because it was a citizen of Indiana where it was first chartered: and the intimation was, as we have seen, that there were two independent corporations, one in Indiana, the other in Ohio. On the other hand, in the later case, *Railroad Company* v. *Harris*, the other view is taken, (that which Mr. Morawetz adopts), that the corporation is one, but, nevertheless, it is a "citizen" of both States. In the first case, the right of removal was negatived by the view that the recharter created a distinct corporation, domestic as to the State where rechartered: in the second case, it was held the license to operate in the second State included in its terms amenability to the Courts of the State granting such license. Hence in this case, (*Railroad* v. *Harris*), on page 83, the Court says: "In the *Baltimore and Ohio Railroad Company* v. *Gallahue's Administrator*, 12 Grattan, 658, it was held by the Court of Appeals of Virginia that the company was suable in that State. *In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it.* The authority of that case was recognized by the Court of Appeals of West Virginia, in *Goshorn* v. *The Supervisors*, (1 W. Va. 308) and *Railroad Company* v. *Supervisors*, (3 Ib. 319)." After such an unequivocal expression of this Court, it is almost inconceivable how legal ingenuity could have distorted this case into an authority in favor of removal, on the part of the Baltimore and

Ohio Railroad Company. How little importance this Court attached to the theoretical variance of view between the case in 1st Black, (*Railroad* v. *Wheeler*), and that in 12th Wallace (*Railroad* v. *Harris*), is shown by the subsequent case of *Railroad Company* v. *Whitton*, 13 Wall. 270.

The syllabus of this case is as follows:

I. Although a corporation, being an artificial body created by legislative power, is not a citizen, within several provisions of the Constitution; yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies between the citizens of different States.

II. Where a corporation is created by the laws of a State, it is, in suits brought in a Federal court in that State, to be considered as a citizen of such State, whatever its status or citizenship may be elsewhere by the legislation of other States.

Justice Field, in delivering the opinion of the court, said, on pp. 283–85:

"In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*. In that case the declaration averred that the plaintiffs were a corporation created by the laws of the the States of Indiana and Ohio, and that the defendant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the State which created it, and therefore that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against citizens of the latter State, and of course could not be maintained in a court of the United States, where jurisdiction of the case depended upon the citizenship of the parties."

Again:

"The correctness of this view is also confirmed by the recent

decision of this court in the case of *The Railroad Company* v. *Harris*. In that case a Maryland railroad corporation was empowered by the Legislature of Virginia to construct its road through that State, and by an act of Congress to extend a lateral road into the District of Columbia."

"And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that State and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations *and made it subject to suit in Virginia and in the District*. The corporation, said the court, can not migrate, but may exercise its authority in foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly. For the purposes of Federal jurisdiction, it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted."

It is hence perceived what a waste of time it would be to discuss the question whether the act of March 8th, 1827, and the supplemental and amendatory act of March 6th, 1847, created a new corporation, or whether they licensed an existing corporation, in *terms which implied that it should consent to be sued in Virginia, which condition the company, by building the road, and also by express acknowledgment in writing, assented to.*

In either view, there is no right of removal.

The act of March 8th, 1827, re-enacts the Maryland charter *in totidem verbis*, and grants to the company the same franchises, subject to the same limitations and conditions, as are granted in Maryland by the Maryland act; and the same rights, privileges and immunities which are reserved to the State of Maryland, or to the citizens thereof, are reserved to the State of Virginia and her citizens.

Among the privileges granted by the second section of the Maryland Act, was "*to sue and be sued*"—in Maryland. The same privilege is granted in Virginia—*to sue and be sued there*. This, certainly, rendered the company suable in Virginia, and suable in her own courts. This is only one example, and by no

means the strongest of the provisions of the Maryland law, which rendered the company a "citizen" — that is, amenable to the courts — of that State, and which, when reenacted by Virginia, must have had a similar efficacy to establish the "citizenship" of the company in Virginia, as to its operations within her territory.

But lest there should be some doubt upon this subject, when the company failed to complete its road within the ten years specified in the charter, the Legislature of Virginia amended and supplemented the original act by several others. One of these, that of March 6th, 1847, (see Appendix) *the Railroad Company has accepted*, as appears by its letter to the Attorney-General of West Virginia, dated June 21st, 1871, (see App.) and said act is a part of the contract by which it does business in West Virginia." The sixth section of this act provided, "That said company shall be subject to the provisions of the act of assembly passed on the 11th day of March, 1837, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable."

I have copied in the Appendix such portions of this general railroad law as appear to be properly applicable. (See Appendix p. —.) The first section provides, "That whenever it shall be deemed necessary by the General Assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly reenacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide."

Among the provisions embodied in the act is one, (sec. 9), conferring the power to exercise eminent domain; and in sec. 20, that in case of the abandonment of the road by the company, the charter shall be annulled, and the State may take possession of the road, otherwise the lands shall revert to the original owners; by sec. 21, penalties are imposed for failure to transport, or exacting illegal tolls, which may be recovered by the injured party by motion in the *county or corporation court, or superior court of law for the county or corporation in which such*

preference has been given; sec. 27 provides for regular reports by the company to the Board of Public Works of the State; sec. 35 provides that the charter may be amended or modified by any future Legislature, provided vested rights shall not be taken away or impaired. This general railroad law was accepted by the company, as we have seen, and such assent certainly rendered it a domestic corporation in the territory of West Virginia.

The effect of requiring a railroad company to become "*subject to the general laws of the State*" which licenses its extension into her territory, was passed upon by this court in *Clark* v. *Barnard*, 108 U. S. 436.

The Legislature of Rhode Island authorized a railroad in Connecticut to purchase another road created under the laws of both States; and subsequently the same Legislature authorized the purchasing road to extend, within the limits of Rhode Island, the road thus acquired. The 8th section of this enabling act was as follows: "Said railroad, when the same shall have been constructed, shall be managed and protected in all respects according to the provisions of, and subject to, an act entitled an act to incorporate the Providence and Plainfield Railroad Company, *and the general laws of the State*." In commenting upon the effect of this enabling statute, this court said: "If it, [the purchasing railroad], had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Connecticut corporation, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter, to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut; and, by accepting charters from both States, could well become a corporate body, by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership. Such

was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of the state, subject to its laws, and competent to do within its territory whatever its legislation might authorize."

The distinction already established by this court between the recharter of a railroad by, and a mere license to traverse the territory of a state, will be still further illustrated by comparing the views expressed in *Stone* v. *Farmer's Loan and Trust Company*, 116 U. S., 307, with those given in a later case, in 118th, U. S., which I shall place in juxtaposition. In the former case, the court said, (page 333:)

"There can be no doubt that each of the states through which the Mississippi & Ohio Railroad passes incorporated the company for the purpose of constructing a railroad from Mobile through Alabama, Mississippi, Tennessee and Kentucky, to some point near the Ohio river where it would connect with another railroad to the Lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico on the south, and the Great Lakes on the north. It is equally certain that Congress aided in the construction of parts of this line of road, so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each state is for all the purposes of local government a *domestic corporation*, and that its road within the state is a matter of domestic concern."

In confirmation of, or contrast with the law as thus laid down, I will here give an extract of opinion of the court, in *Penn'a Co.* v. *St. Louis, Alton, &c. Railroad*, 118 U. S. Reports, pages 295–6.

"It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may by permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the leg-

islature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state, to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

In a case where the corporation already exists, even if adopted by the law of another state and invested with full corporate powers, it does not thereby become such new corporation of another state, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it.

Whether there is any conflict of principle in the two views here placed in juxtaposition, is not important for us to inquire, since with regard to the case now before the court, as we have seen, it is certainly governed by one or the other of these principles, and to us it is quite immaterial under which it may be classified. Whether we regard the Baltimore and Ohio Railroad Company as rechartered by Virginia, or only licensed to traverse her territory, *the legislation we have considered, the building of the road under it, and the authorized accession to its terms, by the company, render the company, for all the purposes of local government, a domestic corporation in West Virginia.*

That state, both by judicial decision and legislative enactment, *has presistently claimed that, within her territory, the company was a domestic corporation.*

P., W. & K. R. R. Co. v. *B. & O. R. R. Co.*, 17 W. Va., 812; *Henen* v. *Same*, *ib.* 881; *Quarrier* v. *Same*, 20 *ib.* 424.

This contention has been confirmed by this court, as a correct interpretation of existing legislation.

Railroad v. *Harris*, 12 Wall. 82–3.

In 1873, West Virginia followed up the then existing legislation by a general act declaring that—

"All railroad companies doing business in this state under charters granted or laws passed by the State of Virginia or this state, are hereby declared to be domestic companies or corporations, and shall be treated as such in all cases."

Acts 1872–73, chap. 227, sec. 16.

Again, in 1882, the following Act was passed:

"Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this state, is hereby declared to be, as to its works, property, operations, transactions and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation."

Acts 1882, chap. 97, sec. 30, p. 277; Warth's Amend. Code, chap. 54, sec. 30.

This court will rarely interfere with the polity of a state in the interpretation of her own laws, where such interpretation has become a rule of property, and action for a long period.

And where such interpretation has already once received the unqualified confirmation of the co-ordinate and independent judgment of this court, it would indeed be strange if this tribunal should reverse itself, and at the same time overrule those principles of comity which have hitherto governed its action.

Burgess v. *Seligman*, 107 U. S., 20.

Railroad v. *Harris*, 112 Wall., 82–3.

After this discussion, already too far prolonged, I cannot believe it necessary to advert, at any length to the case of *Railroad Co.* v. *Koontz*, 104 U. S., 5, or the case of *Marye, auditor*, v. *B. & O. R. R. Co.*, 127 U. S., 117. At the date of these decisions the Baltimore and Ohio Railroad Company had long ceased to exercise in Virginia any privilege derived from the

Acts of 1827, or 1847, or 1837, or other enabling legislation which we have been considering. Neither did the line of its road at any point lie in the State of Virginia. Its only relation to that state was that of lessor of one or more Virginia railroads. As such, this court held that it did not necessarily become a domestic corporation.

Nothing in these decisions can, by the remotest analogy, affect the question of removal, which we have been considering. Not one foot of this railroad traverses Virginia; whereas over three hundred miles of its highway occupy the territory of West Virginia.

Upon the whole, therefore, we are bound to conclude that the Baltimore and Ohio Railroad Company, so far as its operations within the territory of West Virginia are concerned, is a citizen and domestic corperation of that state, and that the order remanding this cause to the state court was correct, and should ~~be affirmed.~~ have been entered.

DANIEL B. LUCAS.

APPENDIX.

LAWS IN MARYLAND.

1826.—CHAPTER 123.

(*Passed February* 28, 1827.)

CHARTER.

An Act to incorporate the Baltimore and Ohio Railroad Company.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKim, Jr., William Stewart, Talbot Jones, Roswell L. Colt, George Brown, and Evan Thomas, be, and they are hereby appointed commissioners, under the direction of a majority of whom, subscriptions may be received to the capital stock of the Baltimore and Railroad Company hereby incorporated: and they, or a majority of them, may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper: and that upon the first opening of said books, they shall be kept open for at least ten successive days, from 10 o'clock, A. M., until 2 o'clock, P. M., and if, at the expiration of that period, such a subscription to the capital stock of said company, as is necessary to its incorporation, shall not have been obtained, the said commissioners,

or a majority of them, may cause the said books to be opened, from time to time, after the expiration of the said ten days, for the space of twelve months thereafter, or until the sum necessary to the incorporation of the company shall be subscribed, if sooner subscribed; and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, another may be appointed in his stead, by the remaining commissioners, or a majority of them.

SEC. 2. *And be it enacted*, That the capital stock of the said Baltimore and Ohio Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, of which, ten thousand shares shall be reserved for subscription by the state of Maryland, and five thousand by the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland; and the remaining fifteen thousand shares may be subscribed for by any other corporation, or by individuals: and that as soon as ten thousand shares of the said capital stock shall be subscribed, the subscribers of the said stock, their successors and assigns shall be, and they are hereby declared to be incorporated into a company by the name of the Baltimore and Ohio Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, so far as shall be necessary for the purposes hereinafter mentioned, and no farther, and shall have perpetual succession, and by said coporate name may sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure, and shall have, enjoy, and may exercise all the powers, rights and privileges which other corporate bodies may lawfully do for the purpose mentioned in this act.

SEC. 3. *And be it enacted*, That if more than fifteen thousand shares shall be subscribed to the capital stock of said company, not reserved to the state of Maryland, or to the city of Baltimore, the said commissioners, or a majority of them, shall reduce the subscription to fifteen thousand shares, by striking off from the largest number of shares in succession, until the subscriptions are reduced to fifteen thousand shares, or all the subscriptions to one share: and if there be still an excess, then

lots shall be drawn by the commissioners, to determine who are to be excluded.

SEC. 4. *And be it enacted*, That upon every such subscription, there shall be paid, at the time of subscribing, to the said commissioners, or to their agents, appointed to receive such subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such instalments, and at such times, as it may be required by the president and directors of said company: *Provided*, That not more than one-third of the subscription be demanded in any one year, from the commencement of the work; nor any payment demanded until at least sixty days public notice of such demand shall have been given by the said president and directors; and if any subscriber shall fail or neglect to pay any instalment, or part of said subscription thus demanded, for the space of sixty days next after the time the same shall be due and payable, the stock on which it is demanded shall be forfeited to the company, and may be sold by said president and directors, for the benefit of the company; but the president and directors may remit any such forfeiture, on such terms as they shall deem proper.

SEC. 5. *And be it enacted*, That if the subscription, herein made necessary to the incorporation of the said company, shall not be obtained within twelve months after the first opening of the subscription books, by the said commissioners, this act and all the subscriptions under it, shall be null and void; and the said commisioners, after discharging the expenses of opening the books, shall return the residue of the money, paid in upon such subscriptions, to the several subscribers in proper proportions to the sums respectively paid in by them.

SEC. 6. *And be it enacted*, That, at the expiration of the ten days for which the books are first opened, if ten thousand shares of said capital stock shall have been subsbribed, or if not, as soon thereafter as the same shall be subscribed, if within one year after the first opening of the books, the said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days public notice thereof, and at such meeting the said commissioners shall lay the subscription books before the subscribers, then and there present, and thereupon the said subscribers, or a majority of them, shall elect twelve

directors, by ballot, to manage the affairs of said company, and these twelve directors, or a majority of them, shall have the power of electing a president of said company, either from amongst the directors or others, and of allowing him such compensation for his services as they may deem proper; and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her, and every stockholder may depute any other person to vote and act for it, him, or her, as its, his or her proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

SEC. 7. *And be it enacted*, That to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October, in every year, in the city of Baltimore, by the stockholders of said company, and that the state of Maryland, and the city of Baltimore may each appoint one additional director of said company, for every twenty-five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting; and that the directors of said company, or a majority of them, shall have power to appoint judges of all elections, and to elect a president of said company, either from amongst the directors or others, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur, by death, resignation, or refusal to act, of any president or director, before the year for which he was elected, has expired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company, or a majority of them; and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act, or the by-laws of said company to be made on a particular day, or at a particular time, if not made on such day or at such time, may be made at any time within thirty days thereafter.

SEC. 8. *And be it enacted*, That a general meeting of the stockholders of said company shall be held annually, at the time and

place appointed for the election of the president and directors of said company; that they may be called at any time, during the interval between said annual meetings, by the president and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days public notice of the time and place of holding the same; and when any such meetings are called by the stockholders, such notice shall specify the particular object of the call; and if at any such called meetings a majority (in value) of the stockholders of said company are not present, in person or by proxy, such meetings shall be adjourned from day to day, without transacting any business, for any time not exceeding three days, and if within said three days, stockholders having a majority (in value) of the stock subscribed, do not thus attend, such meetings shall be dissolved.

SEC. 9. *And be it enacted*, That at the regular annual meetings of the stockholders of said company, it shall be the duty of the president and directors in office for the preceding year to exhibit a clear and distinct statement of the affairs of the company; that at any called meetings of the stockholders a majority of those present may require similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the stockholders, a majority (in value) of all the stockholders in said company may remove from office any president or any of the directors of said company, and may appoint others in their stead.

SEC. 10. *And be it enacted*, That every president and director of said company, before he acts as such, shall swear or affirm, as the case may be, that he will well and truly discharge the duties of his said office to the best of his skill and judgment.

SEC. 11. *And be it enacted*, That if any of the said fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore, or to the State of Maryland, shall remain unsubscribed until the organization of the said company; or, if the shares of said capital stock, hereinbefore reserved to the said state or city, or any part of them, shall not be subscribed by said state or city respectively, during the time for which such stock is reserved for them; in either case, the president and directors of the said company, or a majority of

them, shall have power to open books, and to receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell or dispose of such unsubscribed stock for the benefit of the company, for any sum not under its par value; and the purchasers or subscribers of such stock, shall have all the rights, powers and privileges of original subscribers, and shall be subject to the same regulations.

SEC. 12. *And be it enacted*, That the said president and directors, or a majority of them, may appoint all such officers, engineers, agents or servants whatsoever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their pleasure; that they, or a majority of them, shall have power to determine by contract the compensation of all the engineers, officers, agents or servants in the employ of said company, and to determine by their by-laws the manner of adjusting and settling all accounts against the company, and also the manner and evidence of transfers of stock in said company; and that they, or a majority of them, shall have power to pass all by-laws, which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the objects of this act into effect; *Provided only*, that such by-laws shall not be contrary to the laws of the United States, or the laws of any of the States assenting to this act, or any of the provisions of this act.

SEC. 13. *And be it enacted*, That if the capital stock of said company shall be deemed insufficient for the purposes of this act, it shall and may be lawful for the president and directors of said company, or a majority of them, from time to time, to increase the said capital stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company, for any sum not under their par value; and that they, or a majority of them, shall have power to borrow money for the objects of this act, to issue certificates or other evidence of such loans, and to pledge the property of the company for the payment of the same and its interest.

SEC. 14. *And be it enacted*, That the president and directors of said company shall be and they are hereby invested with all

the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore to some suitable point on the Ohio river, to be by them determined, not exceeding sixty-six feet wide, with as many sets of works as the said president and directors, or a majority of them, may deem necessary; and they, or a majority of them, may cause to be made, or contract with others for making said railroad, or any part of it; and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon and use and occupy any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road or its works; and that they may build bridges, may fix scales and weights, may lay rails, may make and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of any part of said road, or any of its works; and may make and construct all works whatsoever which may be necessary and expedient, in order to the proper completion of said road; and that they, or a majority of them, may make, or cause to be made, lateral railroads, in any direction whatsoever, in connection with said railroad from the city of Baltimore to the Ohio river, and in the construction of the same, or their works, shall have, possess, and may exercise, all the rights and powers hereby given to them, in order to the construction or repair of the said railroad from the city of Baltimore to the Ohio river.

SEC. 13. *And be it enacted*, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone, or other materials, or any improvements which may be wanted for the construction or repair of any of said roads, or of any of their works, for the purchase or use and occupation of the same; and if they can not agree, or if the owner or owners, or any of them, be a feme covert, under age, *non compos mentis*, or out of the county in which the property wanted may be, when such land or materials shall be wanted, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant under hand and seal, directed to the sheriff of

said county, directing him to summon a jury of twenty inhabitants of said county, not related, nor in any wise interested, to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten, nor more than twenty days after the issuing of the same; and if at said time and place any of said jurors summoned, do not attend, the said sheriff shall immediately summon as many jurors as may be necessary, with the jurors in attendance, to furnish a panel of twenty jurors in attendance, and from them each party, or its, his, her, or their agent, if either be not present in person or by agent, the sheriff, for him, her, it or them, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them an oath, or affirmation, as the case may be, that he "will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same, required by the company:" and the jury in estimating such damages, shall take into the estimate, the benefit resulting to the said owner or owners, from conducting such railroad through, along or near to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary, filed in his court, and shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed, shall be recorded by said clerk of prothonotary, at the expense of said company; but if set aside, the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same, valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received from the company, without costs,

by the said owner or owners, his, her, or their legal representative or representatives.

SEC. 16. *And be it enacted*, That wherever in the construction of the said road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct the said road across such established road or way, as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass through the land of any individual, it shall also be their duty to provide for such individual proper wagon ways across said road or roads, from one part of his land to the other.

SEC. 17. *And be it enacted*, That whensoever it shall be necessary for said company to have, use, or occupy any lands, materials, or other property, in order to the construction or repair of any part of said road or roads, or their works, or necessary buildings, the president and directors of said company, or their agents, or those contracting with them for making or repairing the same, may immediately take and use the same, they having first caused the property wanted to be viewed by a jury, (formed in the manner hereinbefore prescribed in those cases where the property is to be changed or altered by admixture with other substances before such alteration is made,) and that it shall not be necessary, after such view, in order to the use or occupation of the same, to wait the issue of the proceedings upon such view; and the moneys of the jury, after confirmation and after payment, or tender of the valuation, shall be a bar to all actions for taking or using such property, whether commenced before or after such confirmation, or the payment of said valuation.

SEC. 18. *And be it enacted*, That the said president and directors, or a majority of them, shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon, (and the transportation of persons), goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railway, from the city of Baltimore to the Ohio

river, any sum not exceeding the following rates, viz: on all goods, produce, merchandise, or property of any description whatsoever, transported by them from west to east, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation: on all goods, produce, merchandise, or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation: and for the transportation of passengers, not exceeding three cents per mile for each passenger: and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, merchandise, produce, or property of any description whatsoever along said roads, or any of them, without the license or permission of the president and directors of said company: and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this act, and their successors forever: and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the state's assenting to this law.

SEC. 19. *And be it enacted*, That the said president and directors shall annually or semi-annually, declare and make such dividend as they may deem proper, of the nett profits arising from the resources of the said company, after deducting the necessary current and probable contingent expenses: and that they shall divide the same amongst the proprietors of the stock of said company, in proper proportions to their respective shares.

SEC. 20. *And be it enacted*, That if any person or persons shall wilfully, by any means whatsoever, injure, impair, or destroy any part of any railroad, constructed by said company under this act, or any of their necessary works, buildings, carriages, vehicles or machines of said company, such person or persons so offending, shall each of them, for every such offence, forfeit and pay to the said company the sum of five hundred dollars, which may be recovered in the name of said company by an action of debt, in the county court of the county wherein

the offence shall be committed, and shall also be subject to indictment in said court: and upon conviction of such offence, shall be punished by fine and imprisonment, in the discretion of the court.

SEC. 21. *And be it enacted*, That as soon as this act shall have been passed by the legislature of Maryland, books may be opened, subscriptions received, and the said company organized, and that when organized, the said company and the president and directors of the same, shall have all the powers, rights and privileges granted by this act, and shall be subject to all its regulations in constructing or repairing any of the said railroads or other necessary works or buildings, which may or can be constructed within the limits of the state of Maryland; and in transporting persons, goods, merchandise, or property of any description, along any of said roads; and that the provisions of this act shall be wholly in force, as to all the property of the company which may be situated, or may be within the state of Maryland, and which said company is permitted to hold under this act.

SEC. 22. *And be it enacted*, That if said road shall not be commenced in two years from the passage of this act, and shall not be finished within this state in ten years from the time of the commencement thereof, then this act shall be null and void.

SEC. 23. *And be it enacted*, That full right and privilege is hereby reserved to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, any other railroad leading from the main route, to any part or parts of this state: *Provided*, that in forming such connection, no injury shall be done to the works of the company hereby incorporated.

LAWS IN VIRGINIA.

An Act passed by the Virginia Legislature to confirm a law passed at the present session of the General Assembly of Maryland, entitled, "An Act to incorporate the Baltimore and Ohio Railroad Company," passed March 8, 1827.

WHEREAS, An act has passed the Legislature of Maryland, entitled, "An Act to incorporate the Baltimore and Ohio Railroad Company," in the following words and figures, viz.:—(See Act.)

Therefore, be it enacted by the General Assembly, That the same rights and privileges shall be, and are hereby granted, to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties and obligations, as are imposed by said act; and the same rights, privileges and immunities which are reserved to the state of Maryland, or the citizens thereof, are hereby reserved to the state of Virginia, and her citizens: except that the said company shall not make, or authorize to be made, any lateral road or roads within the territory of Virginia, without the consent of this legislature; that the said road shall not strike the Ohio at a point lower than the mouth of the Little Kanawha, on said river; that the words "or other property," in the seventeenth section of the above recited act, shall in no case be construed to extend to any property other than materials necessary for the construction or repair of said road, or other works or necessary buildings; and that in obtaining a right to any lands through which the contemplated railroad may be extended, or to any timber, gravel, stone or earth, which shall be necessary to the construction or repair of said road, or other works or necessary building within this Commonwealth, "The Baltimore and Ohio Railroad Company" shall proceed in the same manner as is prescribed in the seventh, eighth, ninth, tenth and twelfth sections of an act, entitled, "An Act prescribing certain general regulations for the incorporation of turnpike companies," passed February the seventh, one thousand eight hundred and seventeen;

except also, that any injury which may at any time be done within the limits of Virginia to the said road, or other works or necessary buildings, shall at all times be punished according to the laws which may be in force in this commonwealth, for the protection of the public works of the commonwealth of Virginia.

CHAPTER 98.—1847.

(Passed March 6, 1847.

An Act to authorize the Baltimore and Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia.

1. *Be it enacted by the General Assembly*, That the Baltimore and Ohio Railroad Company be, and they are hereby authorized to complete their road through the territory of this commonwealth, so as to pass from a point in the ravine of Buffalo creek, at or near the mouth of Fish Creek, at a depot to be established by said company on the northern side of Wheeling creek in the city of Wheeling in Ohio county, by such route as upon minute estimates to be made after full examination and instrumental surveys of the feasible or practicable routes shall appear to be the cheapest upon which to construct, maintain and work said railroad; which estimate shall be made on like principles and plans, in like manner and upon a great respective amount of trade and travel as were adopted and employed in the comparative estimates of the company's chief engineer laid before the meeting of the stockholders of the said company held in Baltimore, on the twelfth day of July, eighteen hundred and forty-three: *Provided*, That said railroad shall not be made to enter the ravine of the Ohio river at any point further south than the mouth of Fish creek in Marshall county: *And provided*, That if the said railroad, by the cheapest route to the city of Wheeling, which shall not enter the ravine of the Ohio river at any point south of Grave creek in Marshall county, shall appear from the estimates to be made as aforesaid, to be more costly to construct, maintain and work, than it would be by the route passing into the ravine of the Ohio river at or near the mouth of Fish creek, and thence to the city of Wheeling; and if, when the difference of probable

cost between said two routes shall be ascertained as aforesaid, the city of Wheeling shall agree to pay to said railroad company such difference of cost, by the time said railroad shall be completed and opened for transportation to said depot in Wheeling, (which payment it shall be lawful for the said city of Wheeling to provide for and make), then the said railroad company are hereby required to locate and construct their said railroad so that in passing to said depot in Wheeling, it shall not enter the ravine of the Ohio river at any point south of Grave creek.

2. *Be it further enacted*, That to secure to the said city of Wheeling the benefit of the western terminus, all parts of the said railroad between the Monongahela river and said terminus, shall be opened for the transportation of freight and passengers simultaneously: and the aggregate charge for toll and transportation, upon freight and passagers respectively, shall be the same between Baltimore and any point on said road within a direct distance of five miles from the Ohio river, as between Baltimore and Wheeling.

3. *Be it further enacted*, That nothing in this act contained shall be so construed as to entitle said company to any subscription on the part of this commonwealth to the stock of said company, by virtue of any act heretofore passed, and especially by virtue of the several acts passed March twenty-eighth, eighteen hundred and thirty-seven, and April second, eighteen hundred and thirty-eight, concerning the said company; which said provisions in said acts are hereby declared to be no longer in force and of no effect.

4. *Be it further enacted*, That full right and privilege is hereby reserved to the commonwealth, or to any citizen thereof, or any persons or companies who may hereafter be so authorized by the general assembly, to connect or intersect with the said Baltimore and Ohio road, or any branch thereof, either of the said portion of said railroad now constructed, or to be constructed at any point or points thereof within this commonwealth, any railroad, canal or other road for transportation, leading to or from said Baltimore and Ohio Railroad, or any branch thereof, from or to any other part or parts of this commonwealth, and that all reasonable facilities for the full and free enjoyment of the benefit of such connection or connections shall at all times be

afforded by the said Baltimore and Ohio Railroad Company; and upon failure to receive and transport any such freight and passengers according to their turn, upon payment or tender of the lawful or customary tolls, or to furnish other usual and necessary facilities, the said Baltimore and Ohio Railroad Company shall be liable to all the penalties prescribed and provided for offenses or defaults of like kind in the twenty-second section of the said general act, entitled, "An act prescribing certain general regulations for the incorporation of railroad companies," to be recovered in the manner therein provided, or by any action, suit or motion in any of the courts of this commonwealth, having jurisdiction of the subject.

5. *Be it further enacted*, That the said Baltimore and Ohio Railroad Company shall, within six months after the passage of this act, establish a depot at the Chesapeake and Ohio Canal basin, situated between lock number thirty-two and the Shenandoah outlet lock in said canal, or as near thereto as may be practicable; and shall also allow switches to be put in, with sidelings and branch tracks, to be connected from time to time with said switches, to be constructed at the expense of the said Chesapeake and Ohio Canal Company, for the purpose of accommodating and facilitating in the most ready and economical manner practicable, the transfer of passengers and goods, produce, merchandise, or property of any description whatever, from the said railroad to the canal, and to warehouses that may from time to time be there erected by said canal company, or individuals or others, for the accommodation of the trade on the canal, and from the canal and said warehouses to the said railroad; and that the said Baltimore and Ohio Railroad Company shall also establish, in like manner, a depot at the Chesapeake and Ohio Canal basin at Cumberland, and also at such other point or points within the limits of this commonwealth, along or near the line of the said Baltimore and Ohio Railroad, as may hereafter by act of the general assembly of this commonwealth be prescribed; and shall allow all necessary switches, with sidelings and branch tracks, to be connected from time to time with the said switches as aforesaid, to be constructed at the expense of the said Chesapeake and Ohio Canal Company for the purposes aforesaid.

6. *Be it further enacted*, That said company shall be subject

to the provisions of the act of assembly passed on the eleventh day of March, eighteen hundred and thirty-seven, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable: *Provided*, That said Baltimore and Ohio Railroad Company shall not be permitted to charge for transportation or travel to or from Baltimore from or to any point distant more than five miles in a direct line from the Ohio river, more in the aggregate than for transportation or travel from Wheeling to Baltimore, or from Baltimore to Wheeling respectively, nor more in the aggregate from any depot west of Harper's Ferry to Baltimore, or from Baltimore to such depot, than from any other depot more distant from Baltimore to Baltimore, or from Baltimore, to such last mentioned depot.

7. *Be it further enacted*, That the stock, property and profits of said company, so far as the same may be or accrue within this commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this state: *Provided, however*, That said taxing power shall not be exercised until and unless the nett income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested.

8. *Be it further enacted*, That the general assembly hereby reserves to itself the power of hereafter altering, amending or modifying any or any part of the provisions of this act: *Provided*, That the rights of property and franchises acquired under this act, and the free use and enjoyment of their rights and privileges, as granted by this or any other former act now in force, shall not be taken away or impaired by any such further act of legislation.

9. *Be it further enacted*, That the city of Wheeling may subscribe to the capital stock of said railroad company such sum, not exceeding one million of dollars, and upon such terms as may be agreed upon between the council of said city and said railroad company.

10. *Be it further enacted*, That the said railroad to be constructed through the territory of Virginia, shall reach or cross

the Tygart's Valley river at or within three miles of the mouth of Three Fork creek in the county of Taylor.

11. *Be it further enacted*, That as a condition upon which the powers and privileges of this act are granted, the said Baltimore and Ohio Railroad Company shall accept this act within six months, and enter upon the construction of the continuation of their road hereinbefore authorized within three years, and complete the same within twelve years after the passage of this act.

12. This act shall be in force from and after the passage thereof.

[Extracts from the General Rail Road Law of Virginia are here inserted, as proper in relation to this road, more than one-half of which formerly lay in that State.]

CHAPTER 118.—1837. VIRGINIA LAW.

(Passed Mar. 11, 1837.)

An Act prescribing certain general regulations for the incorporation of railroad companies.

1. *Be it enacted by the General Assembly*, That whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide.

* * * * * * * *

9. Previously to the institution, and during the pendency of proceedings for ascertaining the damages to the proprietor for the condemnation of his land for the use of the company, the president and directors, their officers, agents, and servants, shall have full power and authority to enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure, so that no dwelling house, or space within sixty feet of one, belonging to any person, be invaded without his consent; and if they think the interest of the company requires it, to take possession there-

of for the purposes of the company, and also to enter upon, lay out, and take possession of such contiguous land as they may desire to occupy as sites for toll-houses, warehouses, depots, engine sheds, stables, workshops, and other buildings, for the necessary accommodation of their officers, agents, and servants, their horses, mules and other cattle, and for the protection of the property committed to their care: *Provided*, that the land so laid out and occupied on the general line of the railroad shall not exceed, except in deep cuts and fillings, eighty feet in width: that the adjoining land for the sites of buildings shall not exceed one acre and a half in any one parcel. The president and directors shall describe by certain limits the land which they desire to occupy for any of the purposes aforesaid: and it shall be lawful for them to purchase the land so laid out, or any part thereof. If the president and directors can not agree with the owner or owners of the lands so entered on and laid out, on the terms of purchase, it shall be lawful for them to apply to the court of the county in which such land or the greater part thereof may lie; or in case they fail, within twenty days after they shall have taken possession of said land, to make such application; or if, having made the same, they shall fail to prosecute the proceedings thus commenced, diligently to a conclusion, it shall be lawful for the proprietor of the land to make similar application; and upon such application of either of the said parties, the court shall appoint five discreet, intelligent, disinterested, and impartial freeholders, to assess the damages to the owner, from the condemnation of his land for any of the purposes aforesaid. No such appointments, however, shall be made, unless ten days previous notice of the application shall have been given to the said president and directors, or to any one of them, if the proceedings shall be instituted by the proprietor of the land; or if they shall be instituted by the president and directors, then like notice shall be given to the owner of the land, or to the guardian, if the owner be an infant, or to the committee, the owner being *non compos mentis*, if such owner, guardian, or committee can be found within the county: or if he can not be found, then such appointment shall not be made, unless notice of the application shall have been published at least one month next preceding, in some newspaper printed as convenient as may be to the court-house of the county, and

shall have been posted at the door of the court-house on the first day, at least, of the next preceding term of said court. A day for the meeting of the said freeholders to perform the duty assigned them, shall be designated in the order appointing them; and any one or more of them attending on that day may adjourn, from time to time, until their business shall be finished. Of the five freeholders so appointed, any three or more may act, after having been duly sworn or solemnly affirmed before some justice of the peace, that they will, impartially and justly, to the best of their ability, ascertain the damages which will be sustained by the proprietor of the land from the condemnation thereof for the use of the company, and that they will truly certify their proceedings thereupon to the court of the said county.

10. It shall be the duty of the said freeholders, in pursuance of the order appointing them, to assemble on the land proposed to be condemned, and after viewing the same and hearing such proper evidence as either party may offer, they shall ascertain according to the best of their judgment, the damages which the proprietor of the land will sustain by the condemnation thereof for the use of the company. In performing this duty, they shall consider the proprietor of the land as being the owner of the whole fee simple interest therein; they shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof; and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad, for the use of which his land is condemned: *Provided*, that not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the commissioners.

11. When the said freeholders shall have agreed upon the amount of damages, they shall forthwith make a written report of their proceedings, under their hands and seals, in substance as followeth: "We, ..., freeholders, appointed by an order of the county court of....., for the purpose of ascertaining the damages which would be sustained by....., the proprietor of certain lands

in the said county, which the president and directors of the ..... company propose to condemn for their use, do hereby certify, that they met together on the land aforesaid on the.....day of....., the day appointed therefor by the said order, (or the day to which we were regularly adjourned from the day appointed for our meeting by the said order), and that having been first duly sworn, and having viewed the premises, we proceeded to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land: that we combined with these considerations, as far as we could, a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad, for the use of which the said land is to be condemed; that under the influence of these considerations we have estimated, and do hereby assess the damages aforesaid at the sum of..... .

Given under our hands and seals, this ..... day of ....."

At the foot of the report so made, the magistrate before whom the said freeholders were sworn or affirmed, shall make a certificate in substance as follows: "..... county, to-wit: I, ..., a justice of the peace for said county, do hereby certify that the above named freeholders, before they executed their duties as above certified, were solemnly sworn, (or affirmed) before me, that they would impartially and justly, to the best of their ability, ascertain the damages which would be sustained by the above named ....., from the condemnation of the above mentioned land for the use of the ..... company, and that they would certify truly their proceedings thereupon to the court of the said county. Given under my hand, this ..... day of ....."

12. The report of the freeholders so made, together with the certificate of the magistrate as aforesaid, shall be forthwith returned by the said freeholders to the court of the county; and unless good cause be shown against the report, it shall be confirmed by the court and entered of record. But if the said report shall be disaffirmed, or if the said freeholders being unable to agree, shall report their disagreement, or if from any other cause they should fail to make a report within a reasonable

time after their appointment, the court may, at its discretion, as often as may be necessary, supersede them or any of them, appoint others in their stead, and direct another view and report to be made, in the manner above prescribed. In default of the payment or tender of the amount of damages so assessed, to the proprietor, or of the payment of the same into the court, when, for good cause shown, the court shall have so ordered it, the court shall render judgment in favor of such proprietor for the amount of said damages, and double costs; and may thereupon either compel the company to pay the same into court, or award process of execution therefor, as to them may seem right. And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages were assessed, shall be vested in the company, in the same manner as if the proprietor had sold and conveyed it to them.

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15. If the president and directors, on entering upon the land of any person under authority of this act, shall, by themselves or their officers, do any wanton or wilful injury to such land or its appurtenances, or the crops growing or gathered, or to any other property thereon, the company shall pay to the persons so injured, double the amount of damages, which shall be assessed by a jury, in any proper action therefor; and if such injury be done by any person or persons who have contracted with the company for the construction of any of their works, or by any persons in their employment, such contractor or contractors shall be responsible to the injured party, in the like amount; and in any action brought for the purpose, the defendant may be held to bail upon affidavit before any judge or justice of the peace, that there is good cause to believe that he will leave the commonwealth before a final judgment can be obtained.

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20. The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so

that it shall fail to afford the intended accommodation to the public for three successive years, then, and in that case, also, their charter shall be annulled as to the company, and the state of Virginia may take possession of the said railroad and works, and the title thereto shall be vested in the said state so long as it shall maintain the same in the state and manner required by said charter: otherwise the lands over which the said road shall pass, shall revert to and be vested in the person or persons from whom they were taken, by concession or inquisition, as aforesaid, or their heirs or assigns.

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22. Upon the railroad the company shall have the exclusive right of transportation, and when a portion thereof shall be opened for transportation, they shall at all times furnish and keep in good repair the necessary machines, carriages, and other requisites for the safe and convenient transportation of persons and property. It shall be their duty, at all times, upon the payment or tender of the lawful or customary tolls, to transport to any convenient place of delivery on the railroad, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation of the property of one person over that of another, but as far as practicable shall carry each in the order of time in which it shall be delivered or offered for transportation with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them, or shall fail to take up or set down any passenger or passengers at such convenient point as he or they may desire, upon the payment or tender of passage money, or shall demand and receive more than the lawful tolls or rate of transportation, they shall forfeit and pay to the injured party not less than twenty-five, nor more than one hundred dollars, at the discretion of the court, to be recovered by motion, in the county or corporation court, or superior court of law for the county or corporation in which such preference has been given; or in which they have refused to comply with the requisitions of this section: *Provided*, ten days notice of such

motion be given to the president of the company; and shall, moreover, be liable to an action on the case, in which full damages and double costs shall be recovered: *Provided*, the company shall not be required to put down or take in passengers, produce or merchandise, except at their depots or other regular stopping places, and except when any railroad or stage line may intersect the same.

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27. At the end of one year from the completion of the railroad, the president and directors shall report to the board of public works a statement, in such form as the said board shall require, showing the whole amount of capital stock expended in the construction of the railroad, with the several heads of expenditure, the amount of tolls received during each preceding year, and the nett loss or profit on the capital expended. And at the expiration of every period of three years, after the said one year from the completion of the railroad, they shall return to the said board a similar statement, in like form, showing the amount and kinds of expenditures and receipts, and the nett profits of each year of such period. And for each failure to make the said returns, the company shall be liable to a penalty of one thousand dollars, recoverable on ten days notice in any court having jurisdiction.

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30. The full right and privilege is hereby reserved to the legislature of connecting with any railroad which may be constructed agreeably to the provisions of this act, any other railroad or railroads leading from either termination of, or diverging from, the main route of the same, or of any branch thereof, to any other part or parts of the state.

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32. The company shall not employ its capital or be engaged in any transactions or business but such as may be necessary to the construction of their railroad and works, and their management and preservation: nor shall they subscribe to the stock of any other incorporated company, except for the temporary investment of surplus funds.

33. If any person or persons shall, wilfully and maliciously, remove or disturb any of the company's constructions, or place, designedly and with evil intent, any obstructions on the line of

their railroad, so as to jeopardize the safety or endanger the lives of persons traveling or employed on the same, such person or persons so offending shall be deemed to be guilty of a high crime and misdemeanor, and if such person or persons be free, he, she or they shall be adjudged, on conviction, to be imprisoned in the common jail or penitentiary house, for a term not less than two nor more than five years; and if such person or persons be a slave or slaves, he, she or they shall suffer death without benefit of clergy.

34. If any person or persons shall wilfully destroy or otherwise injure any railroad, or any buildings, engines, cars or other property whatever, connected therewith or belonging thereto, tending to obstruct or interrupt the operations of the company, but without endangering the safety of passengers or others, he, she or they shall forfeit and pay to the company three times the actual damage so sustained, to be sued for and recovered, with full costs, in any court having cognizance thereof, by action of debt, in the name and for the use of the company; and shall moreover be punishable as for a misdemeanor.

35. Any part of any charter or act of incorporation granted agreeably to the provisions of this act, shall be subject to be altered, amended or modified by any future legislature, as to them shall seem proper: except so much thereof as prescribes the rate of compensation or tolls for transportation: *Provided*, That the rights of property acquired under this act, or any other act adopting the provisions of this act, shall not be taken away or impaired by any future act of the legislature.

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37. This act shall be in force from its passage.

LAWS OF WEST VIRGINIA.

[Extract from the general laws of West Virginia governing railroad and other companies, and binding upon the said company herein.]

CHAPTER LIV.

Of the Incorporation of Joint Stock Companies in Pursuance of Article Eleven of the Constitution of the State.

COMPANIES INCORPORATED BY OTHER STATES.

30. Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State, upon complying with the requirements of this section, and not otherwise. Such corporation so complying shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities, that are conferred and imposed by this and the fifty-second and fifty-third chapters of this code, and by chapter twenty of the Acts of 1885, on corporations chartered under the laws of this State. Every such corporation shall file with the secretary of state a copy of its articles of association and of the law and authority under which it is incorporated. The secretary of state shall issue to every such corporation, complying with the provisions of this section, a certificate of the fact of its having done so, which certificate shall be filed and recorded in the office of the clerk of the county court of the county, or one of the counties in which its business is conducted. Such corporation shall also file, in the said clerk's office, a copy of its charter, to be kept and preserved therein. Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia, or of this State, is hereby declared to be, as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and

legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter, or any corporate authority, from any other state, shall do business in this State, as the lessee of the works, property or franchises of any other corporation or person, or otherwise; or bring or maintain any action, suit or proceeding in this State, until it shall, in addition to what is hereinbefore required, file in the office of the secretary of state a writing, duly executed under its corporate seal, accepting the provisions of this section and agreeing to be governed thereby, and its failure so to do, may be pleaded in abatement of any such action, suit or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation, which may not have complied with the requirements of this section, upon any contract, or for any wrong. Every such corporation which shall do business in this State, without having complied with the provisions of this section, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars for each month its failure so to comply shall continue. Prosecutions under this section shall be in the county in which the seat of government is. For every certificate issued under this section the secretary of state shall be paid by the corporation a fee of five dollars.

See Acts 1885, p. 60; 1875, ch. 63; 1881, ch. 17; 1882, ch. 97; 1887, ch. 73.

JOINT RESOLUTION in relation to the Baltimore and Ohio Railroad Company, and directing the Attorney-General to institute judicial proceedings against said company under certain contingencies. (Acts of W. Va., 1871, page 282.)

Be it resolved by the Legislature of West Virginia:

That unlesss the said Baltimore and Ohio Railroad Company shall, on before the first day of July, 1871, communicate to the attorney-general of this State its unreserved recognition of the fact that the said act of the general assembly of Virginia, passed on the sixth day of March, 1847, is binding upon said company, and that the said company is subject to, and will thereafter be

governed by, its provisions, and shall in the meantime so modify its tariff of charges for freight and passengers, in pursuance of the proviso contained in the sixth section of said act, as not to discriminate thereafter illegally and unjustly and oppressively against the trade and travel of the citizens of this state, it shall then be the duty of the said attorney-general, and he is hereby required to institute proceedings against said Baltimore and Ohio Railroad Company, in the proper judicial tribunal of this state, by information, in the nature of a *quo warranto*, or by such other judicial proceedings as the said attorney-general may think most effective to enforce a compliance on the part of said company with the several provisions of its charter, or to abrogate the same.

Resolved, That should the said company make such communication as is mentioned in the foregoing resolution, the attorney-general is hereby requested to deliver the same to the secretary of state, by whom it shall be filed in his office.

Resolved, That a copy of these resolutiens be, by the clerk of this house, communicated to the president of the said Baltimore and Ohio Railroad Company.

Adopted, February 28, 1871.

To the Attorney-General of the State of West Virginia:

In conformity to the Resolutions of the Legislature of West Virginia, passed at the session thereof, which commenced in January, 1871, concerning this company, the Baltimore and Ohio Railroad Company doth hereby certify and communicate to the said Attorney-General its unreserved recognition of the fact, that the act of the General Assembly of Virginia, entitled, "An Act to authorize the Baltimore and Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," passed March 6th, 1847, is binding upon this company, and that this company is subject to, and will hereafter be governed by, its provisions.

In testimony whereof, the said company has caused these presents to be signed by its president and its corporate seal to be hereto affixed.

Done and certified, signed and sealed at Camden Station, the principal place of business of said company, at Baltimore, in

the State of Maryland, this twentieth day of June, in the year one thousand eight hundred and seventy-one.

[SEAL OF B. & O. R. R.]

J. W. GARRETT,
President B. & O. R. R. Co.

STATE OF WEST VIRGINIA,

OFFICE OF SECRETARY OF STATE.

I, Henry S. Walker, Secretary of State of the State of West Virginia, do hereby certify that the foregoing and annexed writing is a true and correct copy of a paper writing filed in this office, on the nineteenth day of January, eighteen hundred and seventy-two, dated June 20th, 1871, and signed by "J. W. Garrett, Prest. B. & O. R. R. Co.," as appears from the files in my said office.

Given under my hand and the Great seal of the said State, at the city of Charleston, this twenty-fourth day of September, 1889.

[G. S.]

HENRY S. WALKER,
Secretary of State.

Office Supreme Court U. S.
FILED.
NOV 3 1893
JAMES H. McKENNEY,
CLERK.

97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 13,949.

J. WILSON MARTIN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF OF DEFENDANT IN ERROR.

JOHN K. COWEN,

Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 13,949.

J. WILSON MARTIN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF OF DEFENDANT IN ERROR.

The first question raised is the right of the Baltimore and Ohio Railroad Company, when sued in a State Court of West Virginia, to remove the case to the Federal Court, on the ground that it is a citizen of Maryland. It is contended by the plaintiff in error that the Acts of the State of Virginia, granting the Railroad Company the privilege of operating its road through the State of Virginia, and the acceptance of the powers so granted, by the Railroad Company, made it a corporation of the State of Virginia, and now, of course, of the State of West Virginia, as all the portion of the State of Virginia traversed by the railroad is now in West Virginia. The right of removal was therefore denied, on the ground that the Railroad Company was a domestic corporation of the State of West Virginia.

It was decided by this Court in the case of Baltimore and Ohio Railroad Company vs. Harris, 12 Wall., on page

81, that the Legislature of the State of Virginia did not create a new corporation of the State of Virginia, by the Acts relating to the Baltimore and Ohio Railroad Company, but granted merely a broad and comprehensive license to the Railroad Company, authorizing it to construct its road with practically the same powers, privileges, obligations and restrictions as those contained in the Maryland charter. The exercise of the power granted under this license to the Baltimore and Ohio Railroad Company, made it suable in the State of Virginia, but because this Court has said that the Baltimore and Ohio Railroad Company is subject to suit in Virginia (now West Virginia), it does not follow, as the plaintiff in error argues, that it does not retain the privileges, as a corporation of the State of Maryland, to remove the suit into a Federal Court. Similar powers have been granted to railroad corporations of one State by the Legislatures of other States, with all the restriction placed on the Baltimore and Ohio Railroad Company by the Legislatures of the States of Virginia and West Virginia, and such powers have, however, been treated as licenses, and not the creation of new corporations.

Callahan vs. Louisville & Nashville R. R. Co., 11 Fed. Rep. 537.

Williams vs. R. R. Co., 3 Dillon, 267.

The very broad distinction should be observed and maintained between corporations which are chartered by one State and afterward permitted by license to come into other States and exercise corporate franchises, and corporations which are chartered by two or more States.

In the first class, although the condition upon which the corporation is allowed to exercise its franchise in the foreign State may be that it shall be amenable to all the laws of the State and be liable to suit therein, yet it is still held to be a citizen of the State creating it, and may, if sued in the foreign State, by a resident of that State, remove the suit to the Federal Court.

In this class belong the cases of—

B. & O. R. R. Co. vs. Harris, 12 Wall. 65.
Callahan vs. R. R. Co., 11 Fed. Rep. 537.
Williams vs. R. R. Co., 3 Dillon, 267.
Penn. Co. vs. R. R. Co., 118 U. S. 295.
Goodlett vs Louisville etc R Co. 122 U. S. 391

In the second class, as the corporation is chartered by both States, it cannot, when sued by a citizen of one of the chartering States, remove the case to the Federal Court, on the ground that it is chartered by another State. It is held to be a domestic corporation of either State, in cases of suit by citizens of the same State.

In this class belong the cases of—

Ohio & Miss. R. R. Co. vs. Wheeler, 1 Black. 236.
Memphis & Charleston R. R. Co. vs. Alabama, 107 U. S. 581.
Stone vs. Farmers' Loan Etc. Co., 116 U. S. 307.

It is argued by the plaintiff in error, that because the Baltimore and Ohio Railroad Company was made liable to suit in Virginia and West Virginia, it cannot remove a case when it is sued to the Federal Court. Liability to suit does not create a citizenship, however a corporation may, by its acts in a foreign State, make itself liable to suit it still retains the privilege of having the suit tried in the Federal Court.

B. & O. R. R. Co. vs. Koontz, 104 U. S. 5.

Any statute of the States of Virginia or West Virginia which provides that the Baltimore and Ohio Railroad Company shall exercise the license granted to it by Virginia, burdened with all the restrictions and limitations imposed upon other railroad corporations created by those States, including the liability to suit in either State, is proper, but if any of these limitations are construed to

prevent it, as a corporation created by the State of Maryland, from removing such suits to the Federal Court, such limitations are void and unconstitutional.

Insurance Co. vs. Morse, 20 Wall. 445.

The plaintiff in error sets out in his brief copies of the Acts passed by the Legislatures of Virginia and West Virginia, and certain resolutions of the Legislature of the latter State, relating to the privileges and powers of the Baltimore and Ohio Railroad Company in those two States. A copy of a letter from the president of the Railroad Company to the Attorney-General of West Virginia is also printed.

The record shows that none of these papers were put in evidence, or were before the Circuit Court in any way. The private acts of Virginia granting the license to the Baltimore and Ohio Railroad Company, the resolution of the West Virginia Legislature and the letter of the president of the Railroad Company, are not such records that the Court can be presumed to have taken judicial cognizance of them, and not having been properly proved before the lower Court, and appearing in the record, it is not proper to consider them here.

Lelard vs. Wilkinson, 6 Peters, 317.

II.

Objection cannot be taken at this time to the time of filing the petition for removal. It was said in Ayers vs. Watson, 113 U. S. 594, speaking of the Act of 1875, that the requirement as to the time of filing the petition for removal is not a jurisdictional matter, and may be waived by the parties; and in French vs. Hay, 22 Wall. 238, that a motion made to remand for this cause, after testimony was taken and the case ready for trial, came too late, and must be held to have been conclusively waived.

This objection to removal is, therefore, one which must be made by the party seeking to have the case remanded,

and must be seasonably made, otherwise he will be held to have waived it. In this case the Record does not show that any such objection was made. It is true, motion was made to remand and was overruled, (Record, page 13,) but it does not appear that this was the ground of the motion. Being an objection upon which the plaintiff could insist, if he did so in due season, or which he could waive, he can not make it for the first time in this Court. It must have been raised and passed upon by the Court below, and this must appear from the Record.

In speaking of the right of the petitioning party to have the order refusing to remand reviewed, the Court says, in Railroad Company vs. Koontz, 104 U. S. 5: "If his motion is decided against him, *he may save his point on the record*, and after final judgment, bring the case here for review, if the amount involved is sufficient for our jurisdiction."

And in Edington vs. Jefferson, 111 U. S. 770, where there was a motion to remand, because petition was not filed in time, the Court said the plaintiff could have the error corrected, "having saved her point on the record." It does not appear from the record in this case that this point was ever raised.

But had this been one of the grounds upon which the motion to remand was made, there would have been no error in overruling it. It is true that before filing the petition for removal the plaintiff had taken a conditional judgment against the defendant.

But it appears from sections 44 and 46 of chapter 125 of the Code of West Virginia, that this conditional judgment may be obtained if the defendant fail to appear at the rule day to which he is summoned, if the declaration is filed.

If this conditional judgment is a bar to removal, a defendant has then only one day on which he can remove, in cases where a declaration is filed, that is the day of his appearance. But it will be seen from sections 46 and 47,

that this conditional judgment does not limit the time for pleading, the defendant may come in at any time before the end of the term at which it becomes final, and have it set aside by appearing and pleading to issue. The judgment is then set aside as of course.

This conditional judgment, or decree *nisi*, as it is called in equity, amounts to a rule plea only; no penalty is attached to the defendant's failure to plead until the lapse of the next term; he has the same right to plead after it is obtained, that he had before, except that he may not plead certain dilatory pleas. If he desires to plead to issue, there is no compulsion upon him to do so before the lapse of the next term—no leave of Court required; no penalty if he fail to do so. The well-known practice is to put in all pleas to merits at the next term. How, then, can it be said that he is required to plead before the lapse of the next term?

III.

The plaintiff in error's first exception (Record, page 15) is to the order of Court overruling his demurrer to the defendant in error's special plea of release. (Page 15.) While the question of the validity of the releases obtained by the Relief Association has never been acted upon by this Court, it has been passed upon by several Courts of last resort, and has always been sustained.

Spitze vs. B. & O. R. R. Co., 75 Md. 162.

State, use of Black, vs. B. & O. R. R. Co., 36 Fed. Rep. 655.

Fuller vs. B. & O. Employees' Relief Association, 67 Md. 433.

Owen vs. B. & O. R. R. Co., 35 Fed. Rep. 715.

IV.

The question mainly raised by the third exception taken by the plaintiff in error, (Record, page 20,) is the question

of fellow servants. Was Martin injured through the negligence of his fellow servants? The proof shows that he was injured through the negligence of one of his fellow servants in the Bayview yard, in leaving open the switch into the main track, and allowing a train to run up into the train of cars on which Martin was employed. The Record does show that this negligent person was one of the switchmen employed in the yard. Throwing the switch was the ordinary routine of the yard. The evidence shows that the nature of Martin's employment made him very liable to receive injury from the carelessness of his fellow servants in leaving open switches of sidings on which the cars he always lived in were sidetracked.

The Record shows that his business as telegraph lineman compelled him to travel from point to point on the line of defendant's road in a special train of cars provided for that purpose. It was part of his daily routine to be hauled from point to point by the engines operated by the other employes of the company, and when his train would reach its temporary destination it would be sidetracked, and would be always liable to injury if the switch of the siding should not be kept closed to protect it. The evidence shows that the accident was caused by some yard employee negligently allowing the switch to be open, whereby an engine and coal train of thirteen cars drifted into the train of cars occupied by Martin and the other telegraph linemen.

No question of a superior officer arises, and the plaintiff in error and the men working around the yard were in the employ of a common master, in a common employment.

In the case of Randall vs. B. & O. R. R. Co., 109 U. S. 478, this Court decided that one who enters the service of another, takes upon himself the ordinary risks of his fellow servants, in the course of the employment.

In the following cases it has been held that a negligent switchman was a fellow servant of other employees, whose business brought them to the yard.

Naylor vs. N. Y. Cen. R. R. Co., 33 Fed. Rep. 801.

Harvey vs. N. Y. Cen. R. R. Co., 88 N. Y. 481.

Roberts vs. Ry. Co., 33 Minn. 218.

See also cases cited in McKinney on Fellow Servants, page 301.

In the case of Gilman vs. R. R. Co., 10 Allen, 233, the employee who was injured by the negligence of a switchman, was a carpenter, whose duties took him over the road. The switchman was held to be a fellow servant. The maintenance of the telegraph line of the Railroad Co. was as essential to the running of the road as the maintenance of track, and this duty of maintenance brought the plaintiff in error and the employees along the road, who worked about his cars in daily contact. He was as much in the yard as a brakeman or fireman.

The fact that the accident happened on Sunday, and the plaintiff in error was not working, does not affect the case. He was in the course of his employment, being hauled from one point to another, and at the time was waiting to be carried from Baltimore to Chester.

It is also contended that the accident happened because the car on which the plaintiff in error was standing, was rotten. The evidence shows that the heavy train consisting of an engine and a train of cars running at the rate of three miles an hour, ran into the camp train backed in the siding.

Something had to break under the strain, but it does not follow that because the platform on which the men were standing gave away, that there was evidence of negligence on the part of the Railroad Company. There was some evidence offered to the effect that some of the

timbers were rotten, but none to show that the cars were not in proper order for the ordinary uses of a camp train.

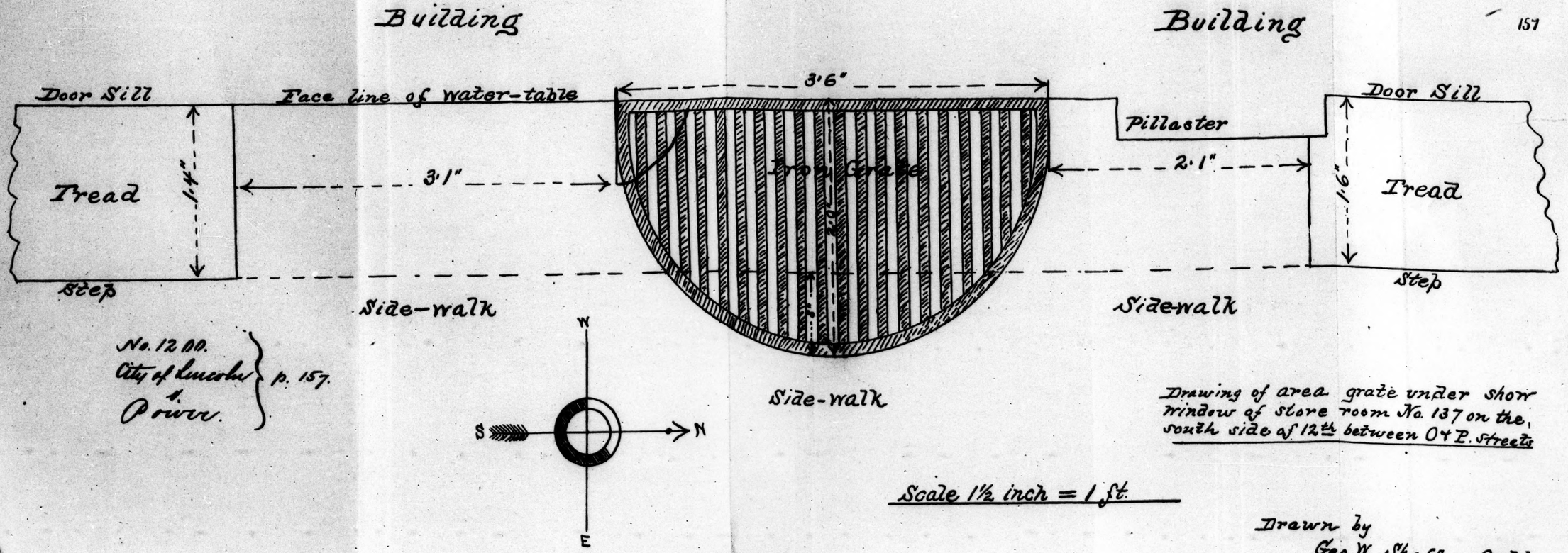
The Company was bound to provide safe cars for its employees, but was not bound to provide cars which were collision proof.

All the evidence shows that the cars were amply sufficient to safely carry the men, and that duty having been performed, all obligation on the part of the Railroad Company ceased. If, therefore, either the plaintiff in error or some fellow servant used the cars for purposes for which they were not intended or in an improper manner, the Railroad Company is not responsible even if the cars were shown to be defective.

Woods' Railway Law, page 1490, section 383.

JOHN K. COWEN,

Attorney for the Defendant in Error.



No. 1200.
City of Lincoln
1.
Power.
} p. 157.

Drawing of area grate under show window of store room No. 137 on the south side of 12th between O & P. Streets

Scale 1½ inch = 1 ft.

Drawn by
Geo. W. Shaffer, Archt.

T. 3. R. 5. W.

MISSISSIPPI RIVER

Old River

17

16

21

22

23

LOT No 1

LOT No 2 47.72

LOT No 3 40

LOT No 4 104

LOT No 4 64

LOT No 5 40

LOT No 6 40

40.00 chs.

20 chs.

Township Line East 80.00 chs.

ISLAND

Scale 30 Chs to One Inch

Variation 6.25 E.

Lewis & Watson 6.75

The above Plat of Section 22 Township 3 North of Range 5 West in the County of Wilkinson State of Mississippi represents the Lot Division made by the U.S. Deputy Surveyor of said Section 22 dividing it up into Lots as follows, Lots Nos 1, 2, 3, 4, 5 & 6 in Pursuance of instructions from the Surveyor General's Office at Washington City dated the 25th day of June 1849 I made a survey of Lots 1, 2, 3, 4, 5 & 6 in said 22 as above represented & divided and found Lot No 1 to Contain — 33.72 Acres

" " " 2 " " — 47.72 "

" " " 3 " " — 40.00 "

" " " 4 " " — 64.00 "

" " " 5 " " — 40.00 "

" " " 6 " " — 40.00 "

Total : : 265.44 Acres

R. R. Ford
Surveyor

The above Plat of Section 22 Township 3 North of Range 5 West in the County of Wilkinson State of Mississippi represents the old original U.S. Division of said Section 22 as on file in the U.S. Land Office in Jackson Mississippi by said U.S. Deputy Surveyor and said Section 22 to be divided up into 4 Lots only as Lot 1, Lot 2, Lot 3 & Lot 4. By request of John Lynch Esq. of Natchez Mississippi I Robert R. Ford Deputy U.S. Surveyor made an actual Survey of said Section 22 Commencing on Tuesday the 26th day of June 1849 and ending on Saturday the 28th day of June 1849 Commencing each Lot separately as follows, Lot No 1 to Contain 33.72 Acres

" " " 2 " " 47.72 "

" " " 3 " " 80.00 "

" " " 4 " " 104.00 "

Fractional Total 265.44 Acres

Attest
R. Arburnish.

R. R. Ford
Surveyor

No. 1065.
Maxwell Land Grant Company
v.
John B Dawson.
p. 490.

Map

SHOWING WITHIN THE HEAVY LINE, THUS: ~
ALL THE LAND WHICH DRAINS INTO THE VERMEJO RIVER, BETWEEN A CERTAIN DAM ON THE UPPER END OF J.B. DAWSON'S FARM AND THE LOWER LINE OF WHAT WAS KNOWN AS THE O'DONNEL FARM —
ALSO SHOWING THE DAWSON TRACT AS ADMITTED BY PLAINTIFF, AND AS CLAIMED BY DEFENDANT.

(Made from Defendant's Exhibit No 3 with tract admitted by Plaintiff added.)